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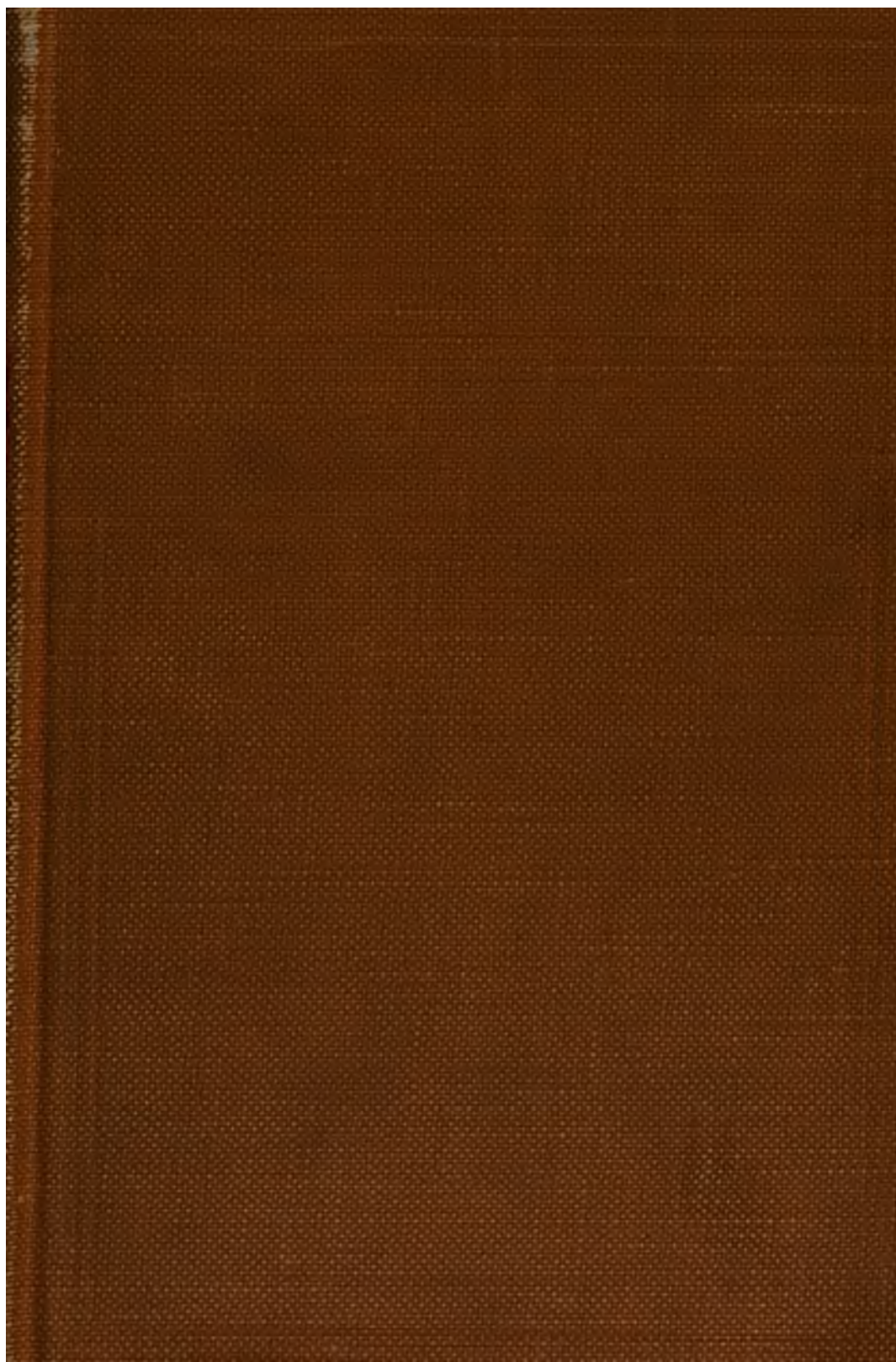
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CONDUCT OF LAWSUITS

OUT OF AND IN COURT:

PRACTICALLY TEACHING, AND COPIOUSLY ILLUSTRATING, THE
PREPARATION AND FORENSIC MANAGEMENT OF
LITIGATED CASES OF ALL KINDS.

BEING A NEW EDITION OF

“PRACTICAL SUGGESTIONS,”

REVISED AND REWRITTEN.

BY

JOHN C. REED,

AUTHOR OF “AMERICAN LAW STUDIES.”

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PREFACE.

CONTRASTED with Practice,—in the main an aggregate of forms and small details variously prescribed by many Legislatures, and which is more and more abandoned by American law authors to the statutes of the State where the case in question finds its tribunal,—our subject, the Conduct of Lawsuits, is a system which is alike in all the States, and in all the courts, whether State or Federal. In the great bulk of cases the end of litigation is to procure or avoid an adjudication that so much money be paid, or certain property be surrendered, or a contract be specifically performed, or such and such punishment be suffered; each cause of action suggested being founded on an act of more than hourly occurrence in every society. The means by which the end is sought are comparison of the rights claimed and the procedure chosen with the directions of the law; and if this do not prove decisive, as most often happens, a further comparison of the proofs of one side with those of the other. While the Code differs from the common law, and some of our

States adopt the former and others hold to the latter, and while procedure in its constituents of forms of declarations and pleas, service, process to produce evidence, and all the remaining items, is settled by every State without apparent regard to the anterior English law or that of other American jurisdictions; on the other hand, the end and the means just described are common to the race, and consequently parties, in all places, strive after similar objects in essentially similar ways. And so the conduct of lawsuits in Maine and in California is really identical. The law of one may differ widely from that of the other in many provisions of great concern to the local practitioner; but this no more requires in each State a different science of managing cases, than the great diversity in the face of the earth, in climate, and in the language and character of the inhabitants, requires a new manual of strategy and tactics for military operations in every new seat of war. There are but three turning-points in litigation. A party wins by showing a legal, evidential, or emotional superiority to the other. Appeal to the judgment in making effective the first two, and excitement of the feelings in the third,—what are more common than these to man the world over! In their preparation, Eastern and Western, English and American lawyers, all seek to provide the superiorities mentioned, and they strive to present and maintain them in their conduct in court. The principles of preparation and

of trial and argument remain unchanged amid all local differences, whether of substantive or remedial law. Like the principles of Evidence, Pleading, and Statutory Construction, and like those of the practical arts, they partake of the universality of logical processes and the laws of human action. Thus it appears that Conduct of Lawsuits belongs to the realm of the general law author, a province which every year becomes more clearly defined in America.¹ And it is my conviction, after long contemplation, that there is no other division, not even excepting the highly developed ones of Pleading, Evidence, and Statutory Construction, in which the general law so completely coincides with that of the State. It is true that a large part of what we call Conduct of Lawsuits more nearly tallies with theory and art, as we commonly use those words, than with the law which we constantly look for in text-books. But as the usual course of things in the courts is held of itself to be authority, we see that even this part belongs to the law. And there can be no hesitation as to the rest, illustrated as it has been by judicial decisions, though with very imperfect development, as we shall soon show.

¹ See American Law Studies, §§ 196, 197, 200, 810-820, distinguishing the general law from State and Federal law, presenting its leading importance in education, and telling how it is the concern of the text-writer; and contrast with *Ibid.*, §§ 1002-1011, which show the smaller place occupied by the general law in actual practice. In these passages I have taken great pains to develop the subject adequately from every important point of view.

Our subject is of the greatest moment to the lawyer. Its mastery is the most important part of his professional education. If he does not know the right methods of preparing and trying his case, any success of his will be accidental only, and he must soon give way in the arena of practice to those of his brethren who do know them.

An old author defines art, in its sense of theory, to be a pre-instruction which shows the true way and reason of doing something.¹ I would impart fully the *rationale* of both the preparatory and forensic management of cases, and I hope that in my effort I have conformed to the definition quoted. And further, I have throughout clung so closely to actual and familiar facts that I also hope my brethren will feel,—to paraphrase the language of Shakespeare, which has long seemed to me to show the essence of sound teaching—that the business and practical needs of litigation prompt all that I say.² This book was conceived, and it has been written, while the author was laboriously engaged in a general practice.

I do not pretend to have established anything new. I only claim that I have been the first

¹ “*Ars est praeceptio, quae dat certam viam rationemque faciendi aliquid.*” Auct. ad Her., l. 1.

² The Archbishop having lauded the wisdom with which Henry V. discourses of affairs of church and state, of war and of policy, and then the unquestioning acceptance of the King's views by all hearers, gives his conclusion in these words alluded to in the text :—

“So that the art and practic part of life
Must be the mistress to this theoric.”

exhaustively to analyze and systematically to present and illustrate the all-important principles which every good lawyer follows, or ought to follow, in managing litigation. My business from first to last is with those old principles which cannot be commenced with too early, and to which the best endowed member of the profession yields increasing obedience while he is maintaining and extending his leadership. It is high time that they be properly elucidated as a whole; and that the young lawyer, instead of being left to pick them up at random and haphazard in a long mis-spent novitiate of practice, be furnished with a manual explaining to him how understandingly to take, ably prepare, and skilfully try his cases. The author trusts that he has in the following pages given his younger brethren this needed book.

The reader is referred to the General Introduction for a fuller and more precise statement of the scope and purpose of the work.

J. C. R.

ATLANTA, GA., May, 1885.

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CONDUCT OF LAWSUITS.



GENERAL INTRODUCTION.

CONDUCT OF LAWSUITS.

GENERAL INTRODUCTION.

§ 1. THIS chapter is intended to be more than a prefix for form's sake, of not very relevant matter, as an Introduction often is. Those parts of it which sketch the ways and province of the lawyer; the object of society in encouraging him; law, fact, and passion as the resources of each party; the art of finding and using decisive advantages brought out prominently by a comparison with the methods of games and warfare,—have been meditated with great care. Reinforced by the remaining passages,—such as those which review the applicable literature and display the purpose of our present work,—they will be, we think, of great help in clarifying and fixing the conception with which it is proper that the study of the principles of practice should be commenced. Although this conception can be no more than provisional, yet the young lawyer is interested to have it the very best possible.

After this call to attention we begin.

§ 2. Practice includes much more than the management of lawsuits. Besides considering proposed actions and defences and pronouncing for or against them, the practitioner in his chambers, as we suggest more fully elsewhere,¹ is full of other occupations,—such as answering

¹ American Law Studies, §§ 100, 101, 1017.

consulting clients, examining titles and making abstracts, drawing conveyances and collecting money, or lending it out on approved security. In view of the importance of the business last suggested, and the fact that, as a general rule, it gives the young lawyer his principal employment in the opening of his career when he is in most need of instruction, for a long time while contemplating this new edition we purposed to present all the several branches of professional employment, having selected for a motto to declare our enlarged scope on the titlepage, —

“*Seu linguam causis acuis, seu civica jura
Respondere paras.*”

But the longer we thought the matter over, it appeared to us the more clearly that the Conduct of Lawsuits calls for separate treatment.¹ It is more a complete whole than Statutory Construction, Pleading, or Evidence, every one of which has long had its special treatises. It is also of such fundamental character and all-embracing reach, that the mastery of its essential principles is the chief education for the other branches of practice; for nearly all right effort in these is fashioned after the example of counsel in the conduct of litigation. To pronounce upon a title, to draw a contract, to advise a client, — to do these things as they ought to be done demands a consideration of the details of evidence, which is like the preparation necessary in issues of fact; and every one of these often necessitates a search for the governing authority which finds its pattern in the investigation of counsel meditating how they will attack the adversary or

¹ Those familiar with Roman law will remember the distinction between *jurisdictio contentiosa* and *jurisdictio voluntaria*.

fortify against him on the law. When these processes of dealing with the particulars of controverted cases and the pertinent law have been firmly acquired, the rest of professional training will come spontaneously and in the best way. That they receive emphatic attention in the conduct of litigation, and are therein more completely set forth and exemplified than anywhere else, is an imperative argument for having the student begin his study of the *rationale* of practice with the department which is, as it were, the lawgiver to the rest.

§ 3. In a late work we noted how the concern of the practitioner always to find such positions as will secure the approval of the courts leads him to imitate judicial reasoning.¹ And to represent the method of judges as the typical one of legal investigation is not inconsistent with maintaining that the method of counsel in preparing and conducting litigated cases is the typical one of practice. The sphere of counsel is wider than that of the judge, the former investigating facts as well as law; and he aims at a different object. The judge's sole business is with concrete questions of law, not found by himself, but submitted by others. The lawyer has to do with such questions. He examines perhaps a great many suggested by a particular group of facts, choosing but a few to be made by his pleadings and proofs; and in considering, and at last arguing these, he follows in the main the course of judicial inquiry. But the facts, and not the law, are his first care. He must learn his client's evidence, and conjecture that of his adversary. And his peculiarizing aim is to forecast and execute such measures as will confine the main issues at the trial presided

¹ American Law Studies, § 766.

over by the judge to points of fact or law in which he is stronger than his antagonist. This widely differences the conductor from the umpire of lawsuits. The latter is without initiative and interest, and his entire office is impartially to decide questions of law as they are finally presented by the skill and art of the biased disputants. The process by which the lawyer in litigation ascertains proofs and counter proofs, and puts forth the strength of his side while he weakens that of the other, is what we have just claimed to be typical. One or both of its elements are dominant in all the non-contentious affairs hinted at above. Even in advising one to whom a title is offered — where the lawyer perhaps most closely approaches the judge — there must be industrious inquiry after facts. In nearly all the rest, the counsel begins by contemplating an interest in jeopardy, and becomes unconsciously more and more affected by the leaning of his client, and he generally ends by attempting protection.

The foregoing outlines, sufficiently for this place, the essentials of the conduct of litigation, and vindicates the propriety of devoting the work exclusively to them. We now proceed to give such a presentation as suffices for the purposes of an Introduction.

§ 4. We use the word *Lawsuits*, and its equivalent, *Litigation*, in the widest sense. Whether legal rights be involved in an issue of fact on the law side, or a bill in equity is exhibited to settle intricate accounts or difficult questions of law, or whether the State be proceeding on an accusation of crime, — such and all other conceivable cases, if they are defended, are classed under the words just emphasized. These controversies when offered to the lawyer can be wisely declined, or they can be wisely

taken and skilfully carried on; and we may now indicate our purpose in general by saying that it is to give the principles of what we may term the Right Conduct of Lawsuits or Litigation.

§ 5. To mark off our special field with accuracy, we must show the sphere and objects of the profession in greater detail. We do not find the lawyer's activity fully told in the books which are the daily employment of judge, law author, and lawyer. The report of a case adjudged by a court of errors states only what were the questions made by the record and how they were disposed of; and the same, in the main, is true as to *nisi prius* reports. Our beginning lies far behind trials and arguments, and we are to discuss that which is rarely reported, — that is, how the parties were brought to the issues tried at last. This department is one of such great extent that we give it all of the first one of our two Books. While he is in it, the lawyer is almost at antipodes to the judge. Here he spends most of his time in the particulars of his case, his aim being to secure a battle-ground of his choice, and to have for his side an overweight of force. If not incessantly watched by an alert and industrious adversary, he will often acquire a strength which he did not have at first and cut off the other side from many of its advantages; and he will dexterously lead his antagonist away from positions inexpugnably guarded by judges and authors agreeing, and induce him to stand on others which they unanimously condemn, or he will manœuvre him out of evidential superiority, or win by making some other legitimate move. The ablest judge and the most renowned law writer have not always been good practitioners. All

of us have observed at the bar that greater learning and understanding of the law are sometimes outdone by greater ability to manage legal business. This address in practice, which is often victorious over larger knowledge of the law sources, is our special subject.

§ 6. We have hinted the difference between the disinterested judge and the lawyer who is always seeking the interest of his client, and we are now to work it out more fully. The former is constantly asking himself, Of these two contending parties, which has the right? And he decides according to some applicable rule of law. But the latter is partialized to one side, and his perpetual question is, How can I, conforming to the law and the principles which govern human action, procure the judge to rule, or the jury to find, for my client? His industry in his chambers, poring over records and documents and sifting witnesses, his long strain of attention concentrated upon everything in the trial, and his zeal and sometimes eloquence in argument, are all for another and not for himself. The client can prepare his case and conduct it in court. This is his constitutional right. But as it requires much training to become qualified for managing causes, the litigant engages the services of one who makes the law his profession. This has often been said before, but it is repeated to attract special attention at this place to the representative character of the lawyer. He stands in the shoes of his principal. His education has bred him to avoid the little and sordid selfishness seen in many a client, yet he cannot rise to the serene impartiality of the judge. His cases, that is, his side of his cases, are his idols. His way of life has stimulated his partisanship, and he is often found to be far more earnest and aroused than the party actually interested.

§ 7. And this is the process of nature, that every precious cause be confided for development, protection, or defence to a partial and loving devotee. The wife is intrusted to the self-sacrificing husband, children to the fondness of parents, and the existence of the country is sometimes placed in the hands of the general and army, every one of whom is expected, if need be, to die cheerfully in the cause. All of these guardians are spurred on by the whole world to do their utmost. The parent, husband, general, and lawyer will often achieve for their several charges that which rightfully belongs to others. Yet our hearts approve the faithful deputy, and if he has kept his honor unstained we cannot blame him for succeeding on the wrong side.

§ 8. But society wishes the right, and not a particular lawyer, to triumph, and so she strives to mate against him equal fidelity and strenuousness for the opposing cause. And to decide the contest she selects educated and practised judges and impartial juries, who are to hear whatever the concern and passion of the disputants can say. Every lawyer is free to take any case ; he is unconstrained in its preparation and conduct ; and he is allowed free speech and discussion. The assumption of the law is, that in the main the right will prevail where truth and error combat on equal terms ; and the assumption is justified by experience. The law will have all engaged in the struggle unhampered. Those who show themselves to be right are given the palm of victory, and those who fail are commended for their hearty striving.

§ 9. This train of thought clears up our subject. We thereby see that the law turns even selfishness, partiality, and passion into social benefactors. The resort *ad libitum*

to the courts and the uncurbed preparation and discussion are part and parcel of the liberty which our forefathers brought hither, and the office of the judge and the sacredness of his judgment belong to that majesty of the law which they put above even their liberty in their love. The profession, that is, a ubiquitous body of men making the law their study and its practice their livelihood, and the tried and unbiased judge, are devised to hold the scales of justice even. An inferior practitioner with the law or evidence on his side before an ordinary court is usually an overmatch for a leader doing his best on the other side. In this work we are to deal with common affairs, with average men. We may now and then say a word of great causes, or glance a look of admiration upwards on the few occupying the pinnacles of forensic and judicial fame, such as Cicero, Erskine, Marshall, and Mansfield. But it shall always be our chief concern to keep within the beaten paths of litigation as it is generally managed, it being our leading purpose to show how the average lawyer ought to deal with an average case.

§ 10. It is next in order to present the elements of litigation. Differences as to the law are referred to the judge for decision. In giving judgment, he is guided by the proper authorities, and where they fail to furnish a rule, he is guided by that which appears to be just and reasonable.¹ Disputed facts are usually tried by a jury. In the main, juries exercise the same faculties in passing upon testimony that other people do, whether lay or professional. Were the present system abolished, as it probably will be after a few years, whatever successor tried facts would try them

¹ This subject is explained at length in our chapter on Legal Investigation, American Law Studies, § 765 *et seq.*

as juries do now, and the science of practice would be the same in its leading elements. Often, by commandment or permission, a judge hears the facts, and then he weighs them as a juror would. In the Roman law the *judex*, that is, the lay judge who tried the case, disposed of all the issues, there not being in his province a trace of the distinction of jury and court that obtains with us; and yet the remains of the classical jurisprudence contain full recognition of the difference between law and fact.¹

§ 11. The antithesis of law and fact lies at the threshold of practice. Every case is lost or won either by the decision of the court or by the finding of the jury, or by both together. As law and fact diverge so widely, and the provinces of judge and jury are so far apart, and yet both judge and jury are to co-operate, neither the distinction nor the union of the two must ever be lost sight of. An adversary may say to another, "I do not admit that the facts are as you contend them to be, which difference of ours must be submitted to the jury. And, if the jury hold with you, I shall dispute the proposition of law on which you rely, —

¹ *De juris et facti ignorantia*, is the title of Dig. 22. 6. Here occurs the dictum of Neratius, "In omni parte, error in jure, non eodem loco quo facti ignorantia haberi debet; cum jus finitum et possit esse et debeat. Facti interpretatio etiam prudentissimos fallit"; — which is thus translated by Mr. Phillimore: "In no part of law should ignorance of law and fact be placed on the same footing; since law may be, and ought to be, confined within certain limits. But on the right construction of a fact, the wisest may be mistaken." See Heumann's *Handlexicon*, where, in the second division under *Factum*, many instances of the contrast between that word and *jus* occurring in different parts of the *Pandects* are given; cf. also our *American Law Studies*, § 1234, note 2. Compare these references with the chapter on Ignorance and Mistake of Law and Fact, in 7th ed. of Bishop, *Crim. Law* (§ 292 *et seq.*), and the reader will be of a different mind from Windscheid, who pronounces the distinction between law and fact to be rather external than essential.

that is, I shall in that event admit your facts, but contend that, conceded to the fullest, they do not make a case for you under the law." If the jury agree with him, he will have no need to raise the legal question, for the adverse allegations are found not to be true. But if the jury are opposed, and yet the judge rules that the facts they find, or would find, give no right in law, that decision is also enough for him.

§ 12. The books speak of mixed questions of law and fact. They are left to the jury, with instructions from the court. It is apparent that they involve no new element.

§ 13. The student should ponder long over the two elements just brought to view. They enter into every case. That which presents no issue but a legal question takes the facts for granted, and that which offers only an issue of fact takes the law for granted. In the first case just supposed in this section, the combatants concur as to the facts and raise a question of law; while in the second, being at one on the law, they dispute only as to the facts. We may therefore sum up for the present as follows: Litigation is controversy over either facts disputed, or law disputed, or over both.

§ 14. Usually, no other element is recognized. But there is another, which occasionally triumphs over the strongest possible union of the two mentioned, and it is only a small percentage of genuine litigations in which it needs not to be attended to carefully, either in preparation or court management. It is the influence which the particular case exercises upon the feelings of judges and juries.

§ 15. We will exemplify by two instances. A husband detected his wife and a man in his bed at night. He fired through a window and seriously wounded the two. The

people generally, even the women, said that he ought to have killed them. As soon as the wounded man could be safely carried to court, he pleaded guilty to a charge of adultery, and he received an unusually severe sentence. This was commended by the whole community. It was hoped that, as he had shot back at the husband, he could be convicted of the graver charge of assault with intent to murder. While the grand jury were considering a bill for this offence, the wife testified that the letter making the assignation was written by her at the persistent solicitation of her husband, he telling her that he would be away from home that night and making her think that he did not object to the visit invited ; and she further said that he provided the messenger who bore the letter. Her narrative was not credited, and the husband was called to contradict it. He admitted it to be true. He explained that he had seen much to excite his suspicions, but he could not believe his wife unfaithful. The letter was written and delivered, as she had testified, and he had induced her to think that he should be away, all in order to test her. This disgusted the grand jury, and they forthwith ignored the bill for assault with intent to murder, and also another for adultery pending against the woman. And the community, outraged by what seemed to be the consent of the husband to his wife's unchastity, suddenly discovered a victim in the convicted man. In the eye of the law, the conduct of the husband could not alter his offence. It was simply adultery — a misdemeanor punishable by fine or imprisonment — whether committed with or without the permission of the husband. But a petition signed by many good citizens was presented to the Governor, praying for pardon or commutation. And it was plain that, had this apparently

irrelevant fact of the husband's possible connivance come to light earlier, either the defendant would never have been convicted, or the court in its discretion would have sentenced him to pay only a nominal fine.

§ 16. The fact which, as just told, was so influential, existed before the case was commenced, though it had been concealed for some time. Our second instance is of an occurrence during a trial related by Mr. Harris. A plaintiff suing for breach of promise of marriage had in her testimony made out a rather weak case for damages. In cross-examination the defendant's counsel asked her if she and the defendant had not been in a house together for three weeks while no one else was there. Of course this was an insinuation intelligible to all the hearers, and it led them to expect evidence making it good. But she answered in the negative, with behavior becoming a wronged woman; and as there was not even an attempt to prove anything suggested by the question, it became conspicuous as a needless and wanton insult. Her counsel made it the text of his declamation, and he got round damages. At the end, the narrator enforces his moral by saying, "The action was for breach of promise to marry, but the verdict was for slander."¹

§ 17. The practitioner must know well the common views, sentiments, and creeds of mankind. He must also know their erroneous prejudices, to be used as allies, or to be avoided if need be, and sometimes, though rarely and with desperate risk, to be closed with in uncompromising struggle. The heart governs more than the head. The sitter on the seat of judgment has his weak likes and dislikes. Lord Campbell narrates of Lord Tenterden: "The

¹ Illustrations in Advocacy, 2-21.

bias which chiefly carried Abbott's mind astray . . . was a suspicion of fraud. He had a very indifferent opinion of human nature. . . . He delighted in discovering what he considered a fraudulent contrivance on the part of the plaintiff or of the defendant and in unravelling it. I have heard Scarlett jocularly boast that he had got many a verdict by humoring this propensity, just giving the hint very remotely to the Chief Justice and allowing his Lordship all the pleasure and *éclat* of exposing and reprobating the cheat."¹ Again, a judge is often too much under the influence of a particular lawyer; or a lawyer may have a bewitching popularity with juries; or a party, or a material witness for him, may have a bad name that biases everybody against him. There might be innumerable examples given of causes influencing juries who are sworn not to be influenced by them, and making judges to stumble who try to keep from slipping as they walk.

§ 18. The law as written in the text-books and as revealed in the adjudged cases is not the same as that assumed by its administrators. The reports over which we pore day and night have no presentation of the faces, characters, voices, dress, deportment, and evident bias one way or the other, of the parties and witnesses. The glance of intelligence of a juror unconscious that he is watched, the frown of another, and the smile of still another, — all these are missed. But they were signs by which the lawyer was guided almost unconsciously. There is no place where the emotions have more unconstrained play than in a crowded court-room during an important and exciting trial. The

¹ Scarlett seems to have said this of Lord Ellenborough, and Campbell probably misunderstood him. See the passage in his Autobiography, quoted by us, *American Law Studies*, § 1091.

hearers go along with everything as well as the audience follows the play in the theatre, and though the sheriff and bailiffs keep the best of order, the entire throng perceptibly manifest their approval or condemnation of whatever is said or done. The bar feel this influence: their relatives, friends, and clients are there. The judge is under it too, and he has a fraternal feeling for the people present. And the jury, why, they come from that multitude. All of them, judge, counsel, witnesses, parties, jury, and spectators, are men and women. They live in their feelings; and these impulsive, heady feelings are ever running away with their reason. And thus is there a different law *at nisi prius* from that which is found in Blackstone and Story. And this law is to be learned by him who would be a successful practitioner. He must study the fountains of human action. Through the whole course, from weighing the chances of litigation to the end of the trial, he must keep them in understanding attention in order to make his conduct of the case thoroughly skilful.

§ 19. The subdivision now under consideration has been too much neglected. The law abounds in guards against local influence, partial juries, and all the incursions of passion or affection upon the right. But somehow in the books the part played by the feelings as a factor in litigation is hardly ever mentioned except very briefly or by implication. We do not mean to say that this third element, often of varying and shifting character, and often not present at all, is of superior or even equal effect in the average to either of the other two, but we do mean to say that its importance in daily practice is so great that the young lawyer should have it deeply impressed upon his mind at the outset.

§ 20. We conclude this branch of our subject by stating that there are three divisions which make up the entire course of litigation ; namely, the legal, the evidential, and what, in default of a better name, we call the emotional. These blend together and form a threefold cord of preparation, plan of conduct, and advocacy.

§ 21. Now comes the use to be made of the three elements.

In litigation you either take the aggressive or you stand on the defensive, and your attack or defence is to be based upon one, or two, or all three. The aim of an intelligent conduct is to secure a decisive advantage over the adversary. If you can be stronger on material questions of fact ; or if you can demonstrate that the case turns upon a favorable legal proposition which you can establish ; or if, with a weak case in law and evidence, you can press your antagonist into a strait where his demands will arouse the uncontrollable indignation of judge or jury, — you have the upper hand. And of course you are trebly safe if you have managed to be superior in every one of the three elements. Right management of litigation is therefore founded on intelligible principle, its object being to discover and maintain an ascendancy on those points of controversy which are cardinal or controlling. A little observance of trials and arguments will give the reader a clearer insight into the subject than many more pages, however carefully written and crowded with illustrations. At the close of the evidence and before the argument begins, he will often detect the advantage of the prevailing party, and he will, when hearing the discussion of law points, begin to foresee who will get the decision of the judge. And he will be quicker to discern the rising of a tide of passion and how

it bodes success to one and loss to the other party. Napoleon's saying, that all the art of war consists in being stronger on a certain point, is accepted as an axiom. Likewise in litigation there are turning points, and the party who by fortune or forecast is the stronger upon these will in general prevail.

§ 22. Next for the rationale of managing your resources, that is, how you will seek to have your side the stronger in some decisive respect. And to develop the important distinction between that which ought to be done before, and that which ought to be done during the trial, we begin by contrasting our subject with other conflicts wherein there is a somewhat similar struggle of one adversary to overcome another. There are games, such as draughts and chess, which are wholly trials of skill, the qualifications of the players being everything. But in others, such as cards, chance is an additional factor. Litigation has not the certainty of those first mentioned. It is like whist, where sometimes the luck of the tyro will vanquish the expert. And in war the elements of nature, and occurrences which cannot be anticipated by the wisest, often reinforce the untrained soldier and chastise the over-confidence of superior genius. Still, there are good whist-players and able generals who usually beat all adversaries. There are, too, superb lawyers, who succeed so frequently and often so surprisingly that the undiscerning multitude almost believe them capable at will either of creating resistless combinations or of changing the nature of judges and juries so as to save bad cases. The master of whist makes every play according to the proper rule of the game; the good general directs every movement by the true manual of the art of war; and the able lawyer

chooses his cases by principle, and prepares and manages them by principle.

§ 23. If we contemplate litigation closely, we see that it is more like warfare than it is like a game. In whist, chance, and not forecast, preordains your hand, while in chess and other games of skill and no hazard both players start with equal chances, except that one has the first move. Thus, there can be no definite plan made before the game begins, no marshalling of forces and agencies. On the contrary, a battle or a trial hardly ever occurs so suddenly but that much could have been foreseen and provided for; and if wise anticipation and industry are matched against mediocrity and supineness, in the great number of instances the strategy in war and the preparation in litigation of the former decide the event in advance of the battle or trial. The conduct of a trial or hearing does resemble the playing of a game, but there is in the game no parallel to that provident preparation which the lawyer, moving or defending, may give his case. In this particular of intelligent provision for the encounter, litigation corresponds more closely to warfare than it does to any species of contention. And this similarity goes far deeper than the humorous and striking but superficial comparison which it served Cicero's purpose to make when he exalted his soldier client and disparaged Servius Sulpicius, the lawyer accusing him.¹

¹ In *Pro Murena*, he says: "Servius hic nobiscum hanc urbanam militiam respondendi, scribendi, cavendi, plenam sollicitudinis ac stomachi secutus est." Further on, speaking of the lawyer in the second, and his client in the third person, he continues the comparison: "Vigilas tu de nocte ut tuis consultoribus respondeas, ille ut eo, quo intendit, mature cum exercitu perveneat; te gallorum, illum bucinarum cantus exsuscitat; tu actionem instituis, ille aciem instruit. Tu caves ne tui consultores, ille ne urbes aut castra capiantur; ille tenet et scit ut hostium copiae, tu ut aquae pluviae arceantur; ille exercitatus est in propagandis finibus, tu in regendis, ac

§ 24. Military operations are of two sorts: first, those which anticipate the battle; second, the management of the battle itself. The art teaching the operations preparatory for battle is called Strategy, and the art which rightly conducts a battle is named Tactics. The verbal definition of the former is manœuvring in the absence of the enemy, and the verbal definition of Tactics is manœuvring in his presence. Strategy combines the forces and directs the movements to a certain point where it is sought to overmatch the enemy. It is plain that, if two opposing armies are equal in all other things, the one will generally win which is led by the better strategy. Battles are more often decided by what has been done or left undone beforehand than by the merits or faults of their actual conduct.

nimirum, descendum est enim quod sentio, rei militaris virtus præstat ceteris omnibus. Haec nomen populo Romano, haec huic urbi æternam gloriam peperit; haec orbem terrarum parere huic imperio coegit; omnes urbanae res, omnia haec nostra praeclara studia et haec forensis laus et industria latent in tutela ac praesidio bellicae virtutis: simul atque increpuit suspitio tumultus, artes ilico nostrae contiscunt."

These two passages may be thus translated:—

"Here in our midst Servius carried on the civic warfare of case-answering and drawing all sorts of legal instruments, — full of solicitude and irritation as it is."

"You stay out of bed at night to answer your consultors; he keeps awake that he may lead his army to a place in time. You are aroused by the cock, he by the trumpet; you put in order an action, he a line of battle. Both of you stay on the watch, you that your clients, he that cities and camps, be not captured; he knows how to keep out the force of the enemy, you know how to keep out the surface-water of a neighbor; he is busy in enlarging the boundaries of the empire, you in settling those of adjoining owners; and if I am to speak my opinion, it is that military virtue exceeds all other. For it has produced the name and eternal glory of Rome; it has subjected the world to our sway; all the affairs of the city, all the renowned studies, forensic fame, and activity of the orator, are under the protection of generalship. So soon as there is a whisper of war, our art becomes silent."

If good strategy has stolen a march and massed superior numbers upon the key position, even faultless tactics come too late to rescue the lagging general from predestined defeat. Our word in the vocabulary of litigation corresponding to Strategy is Preparation, but we have none which corresponds to Tactics. And the word Preparation is rather of colloquial than technical use. The distinction of the right provision for the battle from the proper conduct of the battle itself, finds a striking counterpart when we analyze the essentials of the art of managing lawsuits. For in this there must be due performance of all the duties of preparation, and then the trial itself must be rationally managed in the opening, and on through everything else, to the attention with which the final instructions of the court to the jury should be watched.

§ 25. Litigation thus appears to have two leading natural divisions analogous to the two of warfare just explained. The first we call CONDUCT OUT OF COURT, or PREPARATION; and this is the subject of Book I. The other we term CONDUCT IN COURT, which we are half inclined to call TACTICS, from the military nomenclature; and this latter will be the subject of Book II.

We remark here that the chapter on New Trial, and that entitled Victory and Defeat, do not in the strictest logical classification belong where we have placed them; but as everything in them grows immediately out of the conduct of a case in court, and they are very short, they are, we think, properly included in Book II.

§ 26. There is another natural division of the subject of litigation, preceding in the true order the two described above, and we might entitle it Consideration of an Offered Case. It has a correspondence in warfare, for the com-

mander must sit in judgment upon a projected campaign. But as there is so little to say on this division we have assumed that it belongs to Book I. The counterpart of warfare just mentioned is treated by military writers under Strategy.

§ 27. Litigation must not be too elaborately resembled to warfare. It can be illustrated only at times from the latter. But as they both concur in the particulars already pointed out ; — that a proposed campaign or case should be well meditated in order rationally to be declined or accepted, and after acceptance there ought to be provision of superior combinations before the decisive encounter ; that such encounter should be carried on according to proper principles ; and further, that the former is of far greater importance than the second ; — it is well to suggest that the law student may get some useful hints from those works which set forth the leading essentials of warfare scientifically and compendiously.¹

§ 28. In Book I. will be told, as the first half of Litigation, all the things necessary to be done before trial. And it is the anxious desire of the author to possess the student at the very earliest moment of their transcendent importance. Here is the special province of the genius and toil of the lawyer. It cannot be much exaggeration to say that seventy-five per cent of the average success in litigation which is not mere luck, is in the judicious acceptance and fit preparation of cases. Mr. Harris concludes, as he says, from a somewhat careful observation, that in five cases out

¹ Jomini's *Art of War*, and Marmont's *Spirit of Military Institutions*, will be found readable in the American translations, well distinguishing Strategy and Tactics and briefly but accurately explaining the constituents of each.

of six he would back the advocate and not the case.¹ I am without experience in the administration of justice in England, where the attorney and junior counsel are the organs of preparation and perhaps on the whole do their work as well as it can be done under a system which allows no intercourse between counsel and witnesses. Here, in America, if preparation were equal on both sides, I would nearly always back the better case; and if there were a decided difference, I would in five cases out of six back the better preparation. Two lawyers of my time were frequently opposed. The one was always unusually careful to be ready, while his forensic conduct was never brilliant. The preparation of the other was negligent, but his examination of witnesses habitually wrought himself the greatest benefit and his adversary the greatest hurt possible, and his argument was perfect in the logic and persuasion which are most effective in courts. His feats in cross-examination and his taking speech always attracted crowds of delighted listeners. These admirers, however, generally saw their favorite lose in his matches with the man who seemed his inferior. It was nearly always the same thing, — the latter showed the weightier evidence or the better law on the controlling positions, and it plainly appeared that he had succeeded by forethought and provision.

§ 29. Under the other head, Conduct in Court, as the remaining half of Litigation, will be reviewed, in Book II., all the details of the trial or hearing. This is far simpler and less difficult than the former, out of which it grows and by which it is mostly directed and shaped. He who ascribes a controlling influence to mere gifts of speech has never attentively observed and studied forensic controversy.

¹ Illustrations in Advocacy, 3.

Sometimes they do, as a sudden flood, sweep away all resistance, but in the main the sounder position and superior combinations will carry court or jury, though opposed by the eloquence of Demosthenes.

And yet we would not have it inferred from the foregoing, that we underestimate good advocacy. To present the material details of your side in the most telling way and the most effectually to depreciate those of the other, is indeed a great art. And conspicuously does that lawyer tower above his fellows who can with fitting words call up or lay the emotion which is on the watch to turn the scale. The truth is, that perfect management necessarily implies full mastery of the principles elucidated in each one of the two Books of this work. Choate stands solitary at the bar, in being as studious of the theory of oratory as Cicero and as eloquent as he and Erskine, and yet bestowing his greatest effort and care upon the preparation of his cases, rather than of his speeches.

§ 30. We have thus brought into view the outline and scope of our subject. But we wish our student to note here the changes of standpoint that will be necessary. We begin with considering an offered case; the next standpoint is that of preparation generally; the third is that of a definite plan of management; the fourth is the opening of the case and the conduct of the evidence; and the last is the argument. This brief skeleton of our two Books shows their unity as parts of the same whole. We hope that it shows too that we have taken the right road along which to carry the student and young practitioner. And surely every reflecting lawyer will admit that to keep to but one of the parts, as we shall have cause in a moment to note of certain books, is fragmentary and faulty treatment;

for the first part finds its ulterior object and guiding light in the second, and the second is but a development of the other.

§ 31. As an independent branch of the general subject, naturally succeeding the contents of the two Books, we have appended a chapter entitled, *The Character of the Successful Lawyer*. We could not more impressively enforce for the young lawyer, in a striking summary, the importance of the principles of which we had made a detailed exposition in the two Books.

§ 32. We will now make a condensed review of the better and more common works upon our subject and also glance at its remaining literature.

That of Mr. Cox has never got beyond the first volume. Its scope is indicated by its title given below.¹ The chief value of the work is to be found in its detailed treatment of the examination of witnesses, and the last two chapters, the one being entitled *The Defence*, and the other *The Reply*.

§ 33. Mr. Harris's last work² is really an appendix to his larger and more important book, which has already become famous.³ His first work begins with a chapter called *Opening the Plaintiff's Case*. Both of the works are entirely devoted to forensic conduct. The author resolutely discards the irrelevant topics which fill more than two

¹ *The Advocate, his Training, Practice, Rights, and Duties*. By Edward W. Cox, Esq., Barrister at Law. Vol. I., London, 1852.

² *Illustrations in Advocacy*. By Richard Harris, Barrister at Law, Midland Circuit. London, 1884.

³ *Hints on Advocacy. Conduct of Cases, Civil and Criminal. Classes of Witnesses, and Suggestions for cross-examining them, etc., etc.* By the same. 6th edition, further revised and enlarged. London, 1882. See our *American Law Studies*, § 497 *et seq.*, for a rather extensive notice of an American edition.

thirds of Mr. Cox's work, never straying from his chosen theme, which he discusses with much attention to guiding principles and great opulence of illustration. He has decidedly advanced upon the performance of Mr. Cox. Each book is instructive and charming throughout. Especially in the more recent one is the action in the different cases represented with the art and effect of high comedy. We almost feel that it will be received as evidence of our carping ill-nature when we venture to suggest the following defects.

In the first place, as both books are conceived and executed mainly from the standpoint of censuring blunders and mistakes instead of systematically imparting essentials, their doctrine is on the whole negative rather than positive. Next, there is insufficient note taken of the declining influence of mere advocacy, as compared with rational attention to pivotal points of law, evidence, or passion. But the last and greatest fault which we have to mention is, that the effect of the bad or good discharge of precedent duties upon the trial is nearly always overlooked. If it had been otherwise, how much more intelligible and impressive would have been such of his examples as the following: the case of murder in which the Crown miscarried because of the irreconcilable discrepancy of its own proofs;¹ the fatal question by the defendant's counsel to the plaintiff in the breach of promise case, which ought not to have been asked unless the questioner knew it could be followed up effectively, used above by us to exemplify the result in litigation of excited feeling; Cockburn's opening speech in the trial of Palmer;² the opening speech of Hawkins for

¹ Hints on Advocacy, 6th ed., 203-205.

² Ibid., 265 *et seq.*

the prosecution, and his cross-examination of "Old Bogle," in the Tichborne case;¹ the two speeches and the cross-examination, we will stop to say, being based upon the deepest and exactest mastery of details necessarily made out of court. The important fact being neglected, that is, that every one was either the shortcoming from bad, or the triumph of good preparation, these useful illustrations are shorn of more than half their proper force. Failure and success can only teach their lessons well by vividly showing their real causes. Had Mr. Harris brought for himself into distinct apprehension all the operation of the merits and mistakes of conduct out of court, he would have avoided the one-sidedness which has thrown his valuable work out of poise. He has modernized much of the great Roman advocate's teaching for our advantage. But suppose that, with his high dramatic talent, he had brought forth Cicero, breaking from the pent-up walks of English attorney and junior and like an American counsel superintending in person the gathering of evidence against Verres, which he makes so complete that the rich and powerful accused abandons his defence and flies before the examination of the witnesses for the prosecution is half through. This would have furnished the missing companion-piece to the chapter on the defence of Roscius,² fitly representing Cicero's activity in the great region of preparation, — the most important of all, — which somehow the author keeps his eyes away from.

When we reach the Examination of Witnesses, we will make a further criticism of Mr. Cox and Mr. Harris.

§ 34. Mr. Warren's Duties of Attorneys and Solicitors³

¹ Illustrations in Advocacy, 183-239.

² Ibid., 169 *et seq.*

³ Am. ed., Albany, 1870.

is given to that part of the subject which is omitted by Mr. Cox and Mr. Harris. He goes over the whole of preparation of cases, so far as it is the business in England of attorneys and solicitors.

§ 35. There is also something to be found in the treatises on Evidence pertinent to our chapters upon the examination of witnesses, and there are books which we have not mentioned which touch special parts of our subject. As the last head in this statement, we must remind the reader that many good hints are to be found in the current works on legal study,¹ and in the various Lives of English and American lawyers. Our acknowledgments will always disclose the use we make of any author.

§ 36. The student and beginning practitioner need something different from what they will find in the helpful books just noticed. Their real desideratum is that all the details of litigation be fitly ordered as parts of a connected whole. This cannot be done satisfactorily in any other way than by carefully describing Preparation, its foundation, commencement, and leading division, at the outset, and then developing the forensic part as the natural continuation and sequel. To give the first alone, as Mr. Warren does in his Duties of Attorneys and Solicitors, is to break off in the middle; while to handle only the particulars of the second part, as Mr. Cox and Mr. Harris do, is to overleap the right beginning and give the last half of the subject inadequate treatment, for effective advocacy is in the main but the exhibition of the results of proper preparation.

§ 37. The special jurisdictions of superior courts and the consequent division of the bar into members of dif-

¹ See our American Law Studies, §§ 17-70, for a notice of such.

ferent functions, are passing away in England, while in America it has long been common for the average practitioner to be occupied daily with both preparation and forensic conduct of cases on every side of the court. The course of things shows that, amid the details of the two, there is a unity which is so real and near the surface as to be discerned and practically appropriated in the first years of practice. The natural division of contentious members of the profession is not into pleaders and chancery and common lawyers, nor into attorneys and solicitors preparing cases on the one hand and counsel managing them in court on the other hand ; but it is dictated by individual aptitudes for certain grades of legal employment, for office or forensic work, for discovering and marshalling proofs, for arguing law or fact. And every member of these natural classes, to whatever specialties he may confine himself, will necessarily be engaged in gathering and considering facts for actions, or defences and arguments, and in looking up the law applicable ; and he must therefore have a practical mastery of the leading principles discussed in both of our following Books. It thus appears that complete skill in any kind of litigated business postulates an assimilation of the essentials of what we may term the whole art of practice. At the end of this Introduction we shall further enforce the advantage of such a work as this aspires to be.

§ 38. We must now say a word as to the materials at our command. The reports are the staple from which the general law treatises are made. But while we deal with that particular subject which calls the reports into being and which supplies them with the details upon which their opinions and judgments are founded, we can hardly ever

support our propositions by reference to judicial rulings. The above-noticed works of Warren, Cox, and Harris do not cite the adjudged cases upon any principle of preparation or advocacy. Likewise the authors who discuss particular details of our subject, as Proffatt, Best, Greenleaf, and David Paul Brown, — the first briefly handling the opening of the case, and he and the others treating the examination of witnesses, — hardly ever fortify any of their propositions by the authority of the judges.

§ 39. But we will bring out more clearly the small use we can make of adjudications, by now noticing the late work of Mr. Weeks,¹ which treats practising lawyers as a subject of the general law. As he says in his Preface, he cites "some five thousand cases." These are collected from the English and American reports. In addition to the introductory and historical matter, such topics as these fill the chapters : —

The Vocation of the Lawyer, and General Nature of his Office. — Admission to Practice. — Summary Jurisdiction of Courts over Lawyers, Striking them from the Rolls, Suspension from Practice, etc. — Privileges of Attorneys as Officers of the Court. — Disability of the Attorney by reason of his Profession. — His Liability to Third Parties. — Privilege of Confidential Communications. — Retainer, Authority to Appear, and Appearance. — His Authority and Powers by virtue of his Retainer. — Lia-

¹ Attorneys at Law. A Treatise on Attorneys and Counsellors at Law, comprising the Rules and Legal Principles applicable to the Vocation of the Lawyer and those governing the Relation of Attorney and Client. By Edward P. Weeks. San Francisco, 1878.

Our student is reminded that Mr. Weeks uses the word Attorney in its extensive American sense, wherein it is synonymous with practitioner, or practising lawyer, and not in its technical English meaning.

bility of Client to Attorney, Attorney's Compensation, and his Remedy by Action or Lien to receive or secure Compensation.

§ 40. Comparing the foregoing enumeration with the table of contents prefixed to this work, it will be seen that our peculiar subject, both in essence and details, departs widely from that of Mr. Weeks, although the two are closely related. We omitted above the titles of his eleventh and twelfth chapters in order to give them emphasis by particular comment here. The pertinent parts of these titles are : Duties of Attorneys towards Clients. — Liability of Attorneys to their Clients ; Negligence. There is much in these chapters with which we are not concerned, but there occur in them such subheads as these, which either touch or fall within our particular field : —

Legal Duties towards Client. — Duties of Preparing for Trial. — Liability for Mistakes ; for Blunders in Process and Formal Proceedings ; for Ignorance of the Law. — Attorney is not expected to guaranty Success. — Care required. — Diligence required. — Negligence in Conduct of a Cause. — Liability for disclosing Secrets. — Liability for Abandonment of Suit.

These last-mentioned topics are some of the special ones which concern us now. We must note that Mr. Weeks's treatment of them, confined as he is to educating the law from the cases, — which at this place are few and far between, — is extremely general and brief.

§ 41. This notice of the authors who have preceded us as to parts of our chosen theme, and especially the review of Mr. Weeks's treatise, which practically exhausts the cases, show that we must resort somewhere else than to the reports. And we may say, in general, that our

materials can be found nowhere else than in these two places : —

1. The writings of those who have discussed any division of our subject. (The character of these works need not be further described.)

2. The great source always open to correct the errors of writers or to supply their deficiencies ; that is, experience and observation in practice.

§ 42. We must say something as to the proper use of these sources. We have indicated above certain defects of the leading authors. But for all of these, as their pages contain large store of discussion and illustration of our topics, they must receive careful examination. And the other works, especially those belonging to the department of legal biography, deserve attention.

But the second source requires a little more notice here than the other. There are certain current methods of doing legal business. They are acquired, in the main, from the traditions of the bar and by the training in professional customs and modes given by practice. To make a full collection of them demands that one have combined with a considerable experience in a multifarious business a long and attentive search. They do not always lie on the surface. There are many principles of preparation, of advocacy, or of other branches of our subject, which — to apply the language of Lord Bacon — “ the wisest and deepest sort of lawyers have in judgment and in use, though they be not able many times to express and set them down.”¹

And after these details are brought into distinct con-

¹ Preface to the *Maxims of the Law*. See our *American Law Studies*, §§ 457, 460, for another use of this striking passage.

sciousness and the collection indicated is complete, there must be proper co-ordination of the whole and the parts. In doing this important work care must be taken to understand the exact use which every particular naturally serves, so that it be assigned to its proper place.

§ 43. Some years ago, when the author had become busy in a general practice, he often found himself trying, in his unemployed moments, to grasp and arrange the cardinal principles of the right management of lawsuits. He began to devote his leisure to the literature and study of the subject, and in due time he wrote the book which appeared in 1875.¹ That book has been in mind ever since. I hope that by this edition, which gives the results of much additional research and thought, I have bettered it throughout.

§ 44. If I have realized the purpose of my long and studious effort, this result will prove of especial benefit to students and those beginning practice in these two respects : —

1. It will impressively teach that a very large, and the leading, part of the lawyer's peculiar equipment is to be sought in other places than the constitutions, statutes, and reports. While these must receive lifelong attention, it must be remembered, as Lord Bacon says of Studies, that "they teach not their own use." Without this proper use, the profoundest master of the law sources is of no service except to those of his wiser brethren who manage to turn him into a book of reference.

2. Advancement in an art is usually an improvement of its methods ; and this improvement is generally because a clearer comprehension of the end and purpose of the art

¹ Practical Suggestions for the Management of Lawsuits and Conduct of Litigation both in and out of Court.

has led to the discovery of easier, more direct and certain ways. The stage in which absorption and imitation are the only teachers cannot last long. In spite of the antipathy which all practical and earnest workers entertain towards much drill in principles, they note that the super-eminent masters of every art have often taught clearer views of its real theory. The contributions of Cicero in his rhetorical works to advocacy; the conversations of Napoleon upon the conduct of war, embodied by Marmont in his book mentioned above; the rich legacy to the profession of Scarlett's Autobiography, which reflects the light of the sun on the true modes of management in court; Choate's toil upon his cases, and what we are told of the objects at which he aimed in his study and practice; — these are ample proofs of our proposition last advanced. There must ever come the conscious and rational study by all its members of the principles of the chosen occupation, as a part of education for it. And that day has come in the law, as every lawyer may convince himself by recalling the fruitless searches of his first years at the bar, or by observing the eagerness with which his young brethren read everything which promises to reveal the precious secret. I will alter a passage of the *Advancement of Learning*, in which Lord Bacon regrets that "the wisdom touching Negotiation or Business hath not been hitherto collected into writing, to the great derogation of learning, and the professors of learning," in order to particularize and show in a striking light the value of the manual which I would make: —

"But for the wisdom [that is, the rationale] of [legal] business . . . there be no books of it, except some few scattered advertisements that have no proportion to the magnitude of this subject. — For if books were written of

this . . . I doubt not but learned men, with mean experience, would far excel men of long experience without learning, and outshoot them in their own bow."

§ 45. The methods which must be applied day by day in every sort of practice should be fully taught and the student should exercise in them until every one will come automatically as it is needed. It is the mastery of these methods which the author seeks to give his students. And that this mastery is the real efficiency of the practitioner, is the great justification of his undertaking.

BOOK I.

CONDUCT OUT OF COURT.

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CHAPTER I.

A CASE OFFERED.

§ 46. NEARLY all of the principles of preparation both on law and fact are necessarily involved in the proper consideration of a contemplated action or defence by the counsel to whom they are submitted for advice. But we are now to discuss those principles only in such a general outline as suffices for the smaller scope of this chapter, leaving the fuller details to be worked out further on. Where persons are charged with serious offences, or hard demands are resolutely urged against them, the lawyer sees that nothing is to be thought of but resistance to the bitter end. These are exceptional instances, and we have nothing to do with them here but to mention them. It is our business to treat the cases in which the party has a choice and he can be wisely counselled either to yield to his adversary or to cross swords with him.

§ 47. When a lawyer is consulted as to one of these last-mentioned cases — whether the client meditates the bringing of a suit, or the contest of one menaced or already brought against himself — it is first in order to make such an examination as will qualify him to give his voice for or

against litigation. This examination may disclose that the case is hopeless. If so, it is better that the client be made to understand it at once and submit himself to the inevitable command of fortune, than that he be fed with delusive hopes for a while and at the last be taxed with heavy fees and costs, which he cannot avoid feeling to be most oppressive and unjust when he loses the matter in controversy.

§ 48. This preliminary examination suggested in the last section is now to engage our attention. We remark in the beginning that there are many cases which give hardly any trouble. They may turn upon a single issue of fact or law, and the true decision is manifest. Two constructions of a statute may be urged one of which is palpably right, or there may be a conflict between two witnesses. Infinite study will often add no difficulty nor abstruseness to these easy cases. Here the lawyer consulted can promptly tell what is to be done. But cases of intricacy, multifariousness, and perplexity, of doubt and difficulty, impose great labor upon the lawyer ; and we will now set forth how he is to look into them before he is ready to give an opinion.

§ 49. He is to master the details. Ordinarily his first instruction is to be had from the client. The latter should be encouraged to tell all of importance that he knows. And we may here make a special application of a passage from Lord Bacon's essay, *Of Despatch* : —

“ Give good hearing to those that give the first information in business ; and rather direct them in the beginning than interrupt them in the continuance of their speeches : for he that is put out of his own order will go forward and backward, and be more tedious while he waits upon his

memory than he could have been if he had gone on in his own course. But sometimes it is seen that the moderator is more troublesome than the actor."

After you have directed in the beginning, according to Lord Bacon, do not snub the client. His flow cannot be perpetual. He will go through with his communication, giving something like a complete outline. When he makes a pause is the time to question.

§ 50. We now add a quotation from Quintilian, which is more detailed in its directions, and which reads as if it were written by an experienced counsel of our time :—

"Let us allow plenty of time . . . and a place of interview free from interruption to those who shall have occasion to consult us, and let us earnestly exhort them to state every particular off-hand, however verbosely or however far they may wish to go back ; for it is a less inconvenience to listen to what is superfluous than to be left ignorant of what is essential. Frequently, too, the orator will find both the evil and the remedy in particulars which to the client appeared to have no weight on either side of the question. Nor should a pleader have so much confidence in his memory as to think it too great trouble to write down what he hears.

§ 51. "Nor should he be content with hearing only once : the client should be required to repeat the same things again and again ; not only because some things might have escaped his memory at the first recital, especially if he be, as is often the case, an illiterate person ; but also that we may see whether he tells exactly the same story ; for many state what is false, and, as if they were not stating their case, but pleading it, address themselves not as to an advocate, but as to a judge. We must never

therefore place too much reliance on a client ; but he must be sifted and cross-examined, and obliged to tell the truth ; for as by physicians not only apparent ailments are to be cured, but even such as are latent are to be discovered, even though the persons who require to be healed conceal them, so an advocate must look for more than is laid before him. . . . The client must be questioned sharply, and pressed hard ; for by searching into every particular we sometimes discover truth where we least expected to find it.

§ 52. " In a word, the best advocate for learning the merits of a cause is he that is least credulous ; for a client is often ready to promise everything, offering a cloud of witnesses and sealed documents quite ready, and averring that the adversary himself will not even offer opposition on certain points. If it is therefore necessary to examine all the writings relating to a case, it is not sufficient to inspect them ; they must be read through ; for very frequently they are either not at all such as they were asserted to be, or they contain less than was stated, or they are mixed with matters that may injure the client's cause, or they say too much and lose all credit from appearing to be exaggerated. We may often, too, find a thread broken, or wax disturbed, or signatures without attestation ; all which points, unless we settle them at home, will embarrass us unexpectedly in the forum ; and evidence which we are obliged to give up will damage a cause more than it would have suffered from none having been offered."¹

§ 53. This passage, both in its exhortation to look with a sceptical spirit into every part of the case and its warnings against the biased representations of the

¹ Institutes, 12. 8. 7-13 (Watson's Translation).

party, deserves the meditation of every lawyer. If the advice of the celebrated author was wise in his day, it is more valuable now. The present time gives a greater attention to particulars, and it is logical rather than rhetorical as the past was. Everything debated is looked at more closely. Preparation becomes more laborious, and trials, arguments, and instructions of the court slowly increase in length, year by year. The investigations in chambers and of the forum, in common with those of science, grow more careful and accurate. And consequently much must be added to the suggestive and profitable monitions of Quintilian.

§ 54. There cannot be excessive patience with the client, provided the counsel keep him from wandering.¹ Even his complaints and scoldings, when a few interviews have emboldened him, should be attended to, for they are often the throes of difficult expression of an important fact or view. Do not tire of his repetitions. And follow the example of the old lawyer, who always said to his consulter, "Be at pains to tell me all the bad, for I will myself find out all the good." After eliciting his own knowledge from the client, he should be questioned exhaustively as to every quarter where other material facts may exist. He can usually mention persons who witnessed important parts of the transaction in hand; he may have an inkling of relevant writings and of their whereabouts; or he may be able to tell of circumstances which have a bearing upon the case.

§ 55. The lawyer must resort at once to the accessible sources of information other than the client. These sources are usually witnesses and documents. And it is to be here

¹ Cf. our American Law Studies, § 1184.

suggested, that by reason of his experience and training much valuable evidence of different kinds will occur to him which has not been thought of by the client. The witnesses should be examined in person if possible, and not by proxy. They can be brought to some quiet place, and the lawyer must exhaust their knowledge both of the favorable and unfavorable. The client is often seriously mistaken as to their testimony. Besides his inability to grasp and communicate their meaning, he is warped by interest and passion, and he therefore exaggerates their testimony. Very often, too, his ignorance will blind him to great advantages existing where he shrinks from fancied peril. He may be unbiased and unexcited in a high degree, yet he is not trained to sift and probe evidence and he does not know the law. There may be facts incontestably supporting his case, which, from the lack of professional talent, he will fail to find ; or understanding some of the testimony well, but misunderstanding other parts of it, he may build upon a seemingly firm foundation, which will sink away as soon as the whole is properly collated.

§ 56. If there are relevant documents, the lawyer should be satisfied with nothing but the originals, or, if these cannot be had, with copies carefully made and properly executed.

I add an example of a number of examiners of an important paper falling into the same error. A testator had thus limited certain property : "To be used only for the support and maintenance of each of them [his daughters], and the education and maintenance of the children of each of them." Some three or four copyists, each acting independently of the others, gave the item just quoted as follows : "To be used only for the support of the children of each

of them." Several certified copies had been made, and but one had the words as first quoted. A controversy occurred between the counsel on different sides of a case involving the construction of this will as to the true contents of the item mentioned. To settle it, one of them, interested to increase the estate of the testator's grandchildren, wrote to the surrogate of another county who had the custody of the paper, stating the contention without disclosing his side, and asking for the truth. The surrogate, thus put upon the alert, inspected both the record and the original will with particular pains and certified the same mistake. Of course our lawyer felt that his case was sure. But as he could not get his adversaries to admit the words to be as he contended, he examined for himself and to his great surprise found that the solitary copy was right and all the others wrong.

A writing often refers to another or adopts it in whole or in part. Frequently there are several writings, made contemporaneously or at different times, which must be compared before the precise effect of any one of them can be ascertained. A document may contain a power or an authority to which another must conform strictly in order to be of force. There are often special requirements of form or execution for a particular writing. There are sufficient hints in this place of the great care and pains which the counsel must now and then bestow upon documentary evidence before he is qualified to estimate it accurately.

§ 57. We will enforce our counsels by giving a few examples of miscarriages resulting from neglecting to make a proper examination of the testimony before it was offered. An inspection of the paper has disclosed it to be of less

age than the document purported on its face to be. I have seen more than once a writing put in evidence, reciting that it was executed anterior to 1861, but which was disproved because the paper was the inferior and unmistakable kind manufactured by the Southern mills during the last years of the late civil war.

On a trial of an ejectment, the counsel making the general reply for the plaintiff pointed out that the grant which the defendant claimed to have received from a county under a law of the State authorizing it purported on its face to be some years older than the act of the legislature organizing the county, and thus convinced the jury that the grant was a clumsy forgery.

I remember seeing a trial suspended late in the afternoon, the defendant closing his evidence with a strong attack upon the character of the plaintiff, who had made a witness of himself to prove some material facts. His lawyer charged him to come the next morning provided with witnesses to support his character. He came with a cloud. The first, after showing under examination that he was well acquainted with the character in question, answered that it was very bad; the next made it worse; and a third, put up in desperation, could find no sufficient language to describe the vileness of the plaintiff and his unhesitating disbelief of him when under oath. Here the support of the plaintiff was abruptly stopped. It was difficult for the lookers on to decide which was the more amusing, — the chagrin of the plaintiff's counsel, or the disappointment of the witnesses not examined, whose countenances manifested great eagerness to finish properly what had been so well begun.

The damaging effect of a surprise like the last is not to

be calculated. It always strengthens the adversary, it disconcerts the counsel encountering it, causes the jury to laugh at him and his case, and excites them to complete the joke by finding against him even when his evidence may preponderate.

§ 58. We give another illustration of the importance of sifting witnesses before it is decided to act upon their testimony. It is told by Mr. Warren.

“Not long ago . . . an action of trespass was tried before Mr. Justice Coleridge, in which a nonsuit ensued almost immediately after the first and only witness had got into the box ; for it turned out that he had not witnessed the assault, and that all he knew was from the plaintiff, who had told him what had happened. The judge was convulsed with laughter, as also were the whole court, — every one, in short, except the plaintiff and his attorney. How *could* this case have been got up ? It is evident that the attorney must have contented himself with a hasty inquiry from his client what was the name of his witness, and what it was that he could prove.”¹

§ 59. The blunders of relying on documents written upon paper manufactured after their alleged execution, of resting a defence upon a grant which was a palpable forgery, of damning one's character by his own witnesses, and of bringing an action upon the expected testimony of a person who could only repeat what he had heard from the plaintiff, would have been avoided if the lawyers when first consulted had kept their eyes open, and industriously looked into the facts. There occur in ordinary practice but few parallels of the great carelessness just exemplified. Yet there are not many lawyers who study the case enough

¹ Duties of Attorneys, Am. ed., 169.

before they advise action. The positiveness and confidence of the client should be disregarded. He should be used mainly as an index and guide to the evidence ; and all accessible information should be collected, every pertinent document scrutinized, and every possible witness exhaustively questioned, before the lawyer confidently advises to litigate or not.

§ 60. We will strengthen our counsels with two pertinent excerpts from Mr. Warren, which modernize, as it were, the quotation from Quintilian made above. "Your clients are entitled to your best *personal* exertions on their behalf. You are bound to look yourselves, and that patiently and thoroughly, into the affairs on which they consult you, however troublesome and comparatively thankless the task ; thankless, I mean, because of your trouble being, as it frequently is and must be, inadequately recompensed. You have undertaken the duty, and you must go through with it heartily, never devolving on subordinates or others that which the law exacts from yourselves. An indolent, capricious humor may easily betray you into inextricable difficulties and alarming liabilities. Apply therefore your minds closely to the transaction, as though your own interests were concerned. Do not precipitately act upon your client's *statements* as to such and such being *facts*, but ascertain for yourselves if they be facts. It is your bounden duty to do so ; and it will not afterward avail you as a defence, when your professional conduct is challenged by a disappointed client, that you had relied on his statements, if you had the means of ascertaining the correctness of them, but neglected to do so. It will, when challenged, be for you to prove your searches, — your inquiries, — that you went to this person, wrote to that, and were duly in

attendance at the proper time and place. How intolerably mortifying for you to have your duties delineated with cruel precision by the judge *summing up against you* in an action for negligence brought by your client, or by yourself against him for your bill [*sic*], — but unsuccessfully. See in *Wilson v. Tucker*, 3 Stark. N. P. 154, the consequence of an attorney's acting on his client's representation concerning a fact. That client had furnished him with an official extract from a will at Doctors' Commons for the purpose of the client's advancing a sum of money on the security of a legacy bequeathed in the will to the borrower. The attorney, relying on the extract with which his client had furnished him, completed the transaction, counsel preparing the requisite instrument. But it turned out that in the original will there was a clause which did not appear in the extract, . . . such clause rendering the security utterly worthless! On this the client turned round on his attorney, sued him for negligence, and recovered from him every farthing of the money (£210) which the client had advanced on the faulty security! Hear what Lord Tenterden told the jury: 'The complaint is that the attorney did not go to Doctors' Commons and examine the will itself. I am of opinion that by law it is the duty of an attorney not to content himself with a partial extract from a will, *unless* something pass between himself and his client which shows that it is unnecessary to consult the original.' There was contradictory evidence given here; the plaintiff's witnesses saying that the client had requested his attorney to take all pains and examine the will; the defendant's witnesses, on the other hand, stating that the client had told the attorney that the former had made all requisite inquiries as to the sufficiency of the security, and

requested his attorney merely to prepare the deed and complete the transaction. The plaintiff's witnesses, however, were believed, and he succeeded. Would that attorney ever again be guilty of this slipshod mode of doing business? Assuredly not; and take care yourselves never to be so."¹

§ 61. Though the case cited above by Mr. Warren was one of neglect of what we term office business, the principle announced therein by Lord Tenterden is also the requirement by the law of the attorney who is collecting the facts upon which litigation should be discouraged or recommended. Mr. Warren proceeds as follows, and what he says is fully in place here:—

"I repeat then, as a general rule, never rest satisfied with nor act upon the mere representations of clients where you have the means of ascertaining how the facts really stand. And above all eschew a tendency to superficial and slovenly habits of business; ever remembering that you have not only your own client to call in question your conduct and your motives, but also an *opponent* to deal with, whose duty and interest it is rigorously to scan the propriety of your acts."²

§ 62. The second quotation, which we now give, is still more to the point.

"Nothing is easier than to issue a writ; but if improvidently issued, it will by and by come back to you with an awful tale of vexatious and mortifying consequences. Inquire in every direction into facts; see your client himself; ask for and look at his documents, and consider them well; go to the witnesses, or send for them and hear for *yourself* whether they can and will really say what your client tells

¹ Warren, Duties of Attorneys, Am. ed., 238 *et seq.*

² *Ibid.*

you they can and will ; and if you entertain serious doubts, take an opinion on a case, candidly drawn, not slurring over or concealing features which you do not like ; and let all this be done before the writ issues. Generally speaking, you ought to have under your eye the expected proof of the witnesses before you issue your writ, or declare or deliver your pleas, and this in almost as exact detail as though the period had arrived for setting such matters forth in your brief, or for an opinion on evidence.”¹

The concluding sentence of the last-quoted passage is specially to be meditated.

§ 63. The American reader is to recollect that Mr. Warren, in all of the foregoing excerpts, is speaking of the duties of attorneys and solicitors. These classes only in England have direct communication with the client. As they ascertain the facts of cases when they are offered, and as the ordinary American lawyer does the same, these passages should receive careful study from our students and young licentiates. It is to be further remembered that a practitioner here, after learning the facts, also performs the part of counsel to whom the statement of the case is submitted by the English attorney or solicitor, that is, he recommends whether the client will surrender, or seek the judgment of the court.

§ 64. It is implied in the foregoing, that the probable case of the other side is to be conjectured as precisely as may be, and we but mention the matter in order to give it emphasis here. It will be fully treated further on. We

¹ Warren, *Duties of Attorneys*, Am. ed., 168. Compare what is said in the American edition of *Adventures of an Attorney in Search of Practice*, 252-254, as to the over-colored statements of an “angry client.” The work is by Sir George Stephen, although in the edition mentioned its authorship is ascribed to Mr. Warren.

only say now that the lawyer whom we have in mind in this chapter ought also to learn as many of the secrets of the adversary as he can at this particular point of time, before he gives decisive advice.

Here is another similarity of our subject to warfare. No campaign is resolved upon by a good general until the resources, dispositions, and designs of the enemy are ascertained as accurately as possible. Careful inferences from undisputed facts are made, scouts and spies are kept busy, and all available information is gathered from every source.

§ 65. Concluding this part of the chapter, we refer the reader, in a citation given below, to a passage from Judge Cooley's *Suggestions for the Study of the Law*.¹ It is supposed that an abstract of title is brought to a lawyer for his opinion. Nothing can appear plainer and easier at first sight than this abstract, which is given. But the great lawyer consumes many pages in a most elaborate investigation, every part of which is seen to be indispensable, before all doubts as to the title can be cleared up and it can be settled with certainty to be good or bad. The edition is so common that we need not even abridge the passage. If it be supposed that litigation as to the title there in question is contemplated, it becomes an example fully illustrating the painstaking circumspection with which the lawyer must search after the facts and determine their force and effect before he can be sure that he is competent to counsel the client.

§ 66. The day of final advice is not to be procrastinated. The thorough examination necessary should be made promptly. A lawyer in good practice is one of the busiest of men, and he should resolutely correct any propensity

¹ Prefixed to his edition of *Bl. Comm.*, pp. xvii.-xxi., note 4.

to sloth. He will often be confronted with emergencies requiring decisive action at once, and while he should never be in a flurry, he should habituate himself to rapid and earnest work.

Suppose that the mail is laid on your table. There are a dozen letters. Forget everything else ; break open a letter, — a business letter is usually short ; concentrate your attention upon its contents, and in a few seconds you have read it and decided the fit reply. Then answer at once. Go through the rest of the batch in like manner, never permitting your mind to wander, and writing your answer as soon as you have decided what it is to be, and often in a half-hour the letters are all disposed of, and the answers are more neatly and carefully done than if you had wasted a whole morning over them.

§ 67. This is to illustrate the despatch which the lawyer must use. The constant cry to him from many urgent clients is, "What will you do ? What must I do ?" If he had his whole life for the study of one case, he might as long defer his advice as Lord Eldon did his decisions. But the press of business, the disadvantage of losing a term of the court, the uncertainty of the lives of witnesses, parties, and their helping friends, and the interest and urgency of clients, will not let him rest. In a moment, as it were, he is to resolve upon bringing the meditated suit or making the defence proposed, or counselling against them ; and as he is driven speedily to determine such important questions, he should have facility in mastering the information which must be had beforehand.

§ 68. Another important point is now to be treated. Supposing that the details of the client's case have been mastered, and the case of the adversary has been con-
jec-

tured as well as may be, what is the next thing for the lawyer consulted to do?

He is to consider these details in order, in the first place, to ascertain what is the probable truth of the facts. He may have to correct the *prima facie* import of his testimony from the nature and character of the things testified to, or the commonly accepted laws of probability; and he may have to reconcile conflicts, or, in case that cannot be done, to find which side preponderates, — often a problem requiring great insight and ripe judgment for its solution. The operation of pertinent rules of law upon facts is also to be noticed. There are presumptions, some of them disputable and others incontrovertible. A particular group of facts may be a sure claim to some favor, while the law may stigmatize another by refusing it any remedy. Thus it appears that the natural and logical truth of facts is not always their legal truth, and it is the latter which is the special concern of the lawyer.

§ 69. After the facts are grouped and shaped under the law, it is in order to determine what are the points of controversy presented by the parties at variance, and what issues will be probably raised in the event of litigation. These issues may be of law and fact, or the case may disclose an emotional turning point; and it will suffice for our purposes here to have our reader recall what is said of these things in the last chapter.

§ 70. We have now arrived at the final stage in the consideration of an offered case. All the probable evidence being anticipated as far as possible, and the issues being discerned, what shall the lawyer now do? He is to ask himself if the chances of litigation are for or against success. Has his client cardinal superiorities? If he can

conscientiously answer yes to these questions, he is to advise litigation under that remedy and in that court which seem to him the most promising. If he cannot so answer, he should decidedly recommend his client to avoid invoking a judgment.

§ 71. It is important to say a word here of the plan of conduct, the subject of a later chapter of ours. The lawyer ought to have decided how he will litigate before he resolved to litigate. He ought to have a theory of the case. Brutus argued that Milo, charged with killing Clodius, was to be applauded for killing a pernicious citizen, while Cicero maintained that Clodius had been justifiably killed by Milo as a liar in wait, but with no deliberate design to kill on Milo's part. Cicero or Brutus was right according to the evidence. Or both theories might have been presented under the usual dilemma of contradictory defences, when to make good either one would result in an acquittal. The theory, whether of offence or defence, can only be rightly chosen after all the particulars are understood. The true theory is the *sine qua non* of intelligent advice, preparation, and subsequent management of the case, and the lawyer should have settled it at least provisionally before he decided for his client to attack or defend.

§ 72. The lawyer can neither predict nor assure the event; he can at best but expect and hope. He is to be governed by probabilities, not certainties. So the general is justified or not, in action involving the lives of his soldiers and the safety of his country, by the fact that the probabilities favored him or were adverse when he decided and commenced his advance or defence.

§ 73. The lawyer should carry his client to the courts

only when he feels reasonably sure that he has one or more of the legal, evidential, and emotional advantages explained above, and which we will further illustrate here. You may safely advise a defence against a criminal charge upon a measure of evidence that would not be sufficient in a civil case, as the Commonwealth and government are held to stricter proof than a plaintiff. Or you may find that you have to encounter an accomplice, whom the law requires to be corroborated before there can be a conviction upon his testimony, and you can by adroit preparation overwhelm the corroboration, which was fully disclosed in the examination before the magistrate. These two instances are from the criminal law. Or you may be dealing with an issue turning upon a particular to which there are many witnesses divided by bias and interest, and you can effect a preponderance by calling the larger number, by impeaching some of the adverse, and demonstrating that all of them are opposed by palpable probabilities. Or again, your adversary may found his attack or resistance upon an assumption of the law which you can show to be wrong. And lastly, your side may be of invincible popularity with court or jury.

§ 74. We have thus illustrated advantages which are ordinarily decisive for the party possessing them. And the caution must be repeated, that they can only be believed, not known, to exist. The coolest-headed man may make mistakes, and often decide that he has a superiority where on the trial he will be shown the weaker. But when he thinks with good reason that he has a superiority he will do right to advise acting as it suggests. We sum up by saying that a lawyer — to use a colloquial phrase — should take a case submitted to him when, after the examination

and consideration described in this chapter, he has probable cause for believing that he has for his client superior chances to those of the adversary, either on the law or the evidence, or on both.

§ 75. The character of the good lawyer will be more fully discussed hereafter, but it must be said now that he should be neither a timid, despondent, nor an over sanguine man. Napoleon's maxim as to the general can be applied to the lawyer: "The first qualification of a general-in-chief is a cool head, — that is, a head which receives just impressions and estimates things and objects at their real value. He must not allow himself to be elated by good news or depressed by bad. . . . Some men are so physically and morally constituted as to see everything through a highly colored medium. They raise up a picture in the mind, on every slight occasion, and give to every trivial occurrence a dramatic interest."

The maxim further asserts that such men are not fitted for the command of armies. It could be said with truth that they would not be good scouts, nor could they make a true reconnoissance nor rightly report the progress of a battle, nor do well any other act, whether important or trivial, which demands coolness and a well-balanced judgment. And the important point for us is that such men cannot be good attorneys, solicitors, and counsel.

§ 76. We have spoken of men of deficient parts. There is a common fault of born lawyers now to be noticed. It is often said of some bright and inventive advocate, that he is never dangerous until he has lost his case. The commendation generally means that in losing he has learned how to win the case afterwards. If before he loses he has paid the fullest attention necessary to everything, and

he discovers in the trial resources which he could not have discovered otherwise, and it is meant that he is thus dangerous, then the commendation would be just. And if by careful study and prudent acceptance of the case when it is offered, he generally wins at the first trial, all would agree that he is indeed dangerous. Many lawyers permit their case to float at will, and never gain any definite knowledge of it until an encounter in court coerces them to a study which should have been made when it was brought to them. This encounter often demonstrates that these careless counsel should have then advised an abandonment of the case.

§ 77. Other things being equal, he is the most dangerous adversary who learns when the client first comes everything possible concerning the case, and who declines to take, or takes, prepares, and tries it, according to that which he has so learned. Says his biographer: "Burr began practice upon the principle of never undertaking a cause which he did not feel sure of gaining. And I am assured by another venerable lawyer of this city, who was frequently engaged with Burr, that he never in his life lost a cause which he personally conducted." The biographer is right in ranking his subject, as he conceives him, below the first class of lawyers; but the qualities of Burr, as set forth by Mr. Parton, which should be dwelt upon and contemplated, are the coolness with which he looked into the facts of his cases, the indefatigable diligence of his study of these facts, and his resolve not to enlist in a desperate cause. Such qualities in one far inferior in parts to Burr would still make him an eminent lawyer. The danger of having him as an adversary would be that he would hardly ever fail to win.

§ 78. I can never forget a famous lawyer of my old circuit who was known all over the country when I came to the bar. He had an air of winning because he could not help it. So great had become his reputation as a sound lawyer, that when he deliberately took a position there sprang up with the court and profession, and often with his adversaries, the conviction that he was right and invincible. He was as strong on the facts as on the law. At *nisi prius* his management was an adaptive flexibility, parrying every avoidable attack, achieving every inch of vantage ground, and preparing for the final and victorious assault. In the court of errors he would show that there had been no material fault on his side. His verdict stood, and it was usually seen to be right. He was constantly in my thoughts. My first note was that he had always a plan of conduct fully premeditated, which he kept fast hold of amid all the wavings to and fro of the trial. Then I observed that occasionally some unexpected turn would develop the case to be totally different from what his pleadings, his opening, and his examination of witnesses had shown to be his understanding of it, when he would deliberate for a moment and with composure. If he decided to go on, he moved with confidence ; but if he saw no road to success, he surrendered. After a while it struck me that he had, by reason of his activity in politics and his great business, but little time for preparation. I found that he joined with an unusually accurate and rapid insight into the law controlling facts a still more wonderful faculty for discovering at once the whole truth of the case. He seemed to guess unerringly at everything on both sides. He took no bad cases. His independence was complete. No importunities, not even those of charming women,

could enlist his advocacy when he had considered a cause and found it unmaintainable. He somewhat vaunted his firmness in turning off bad cases. He had not the idle ambition of the vain advocate who boasts that he can always win. But he did feel, and with reason, that he could not lose a good case; and he never seemed to desire winning a bad one. His industry was as marvelous as the rapidity of his work. Its only pause was the completion of the task. He used to say that ninety-five per cent of average success at the bar was mere drudgery done in time. I would improve upon his saying, and urge that the most considerable part of success in the law is the drudgery of practice done faithfully and intelligently.

But his example is given here for the special purpose of enforcing the importance of well understanding a case before taking it. He once told me that his victorious career was mainly due to the judicious selection of his cases.

§ 79. In the foregoing sections of this chapter, we have developed the essential parts of its subject. We will now add a few desultory reflections which we think worthy of attention in this place.

§ 80. We commence by saying that while insisting as much as we do upon the closest attention possible to all the details of a case presented before advising the client, we do not wish to be understood as recommending a timid, doubting, and over-cautious spirit. We copy from Lord Campbell's *Life of Hale* a quoted passage which we approve:—

“He [Hale] began with the specious but unpracticable rule of never pleading except on the right side, which would make the counsel to decide without knowing either

facts or law, and would put an end to the administration of justice. If he saw a cause was unjust, he for a great while would not meddle further in it but to give his advice that *it was so*. If the parties after that would go on, they were to seek another counsellor, for he would assist none in acts of injustice. Yet afterwards he abated much of the scrupulosity he had about causes that appeared at first view unjust."

§ 81. The lawyer must recollect that the more conscientious he has been in his past practice, the more will his clients be disposed to acquiesce in his decisions. There are many of our profession in America whose word is law to almost nine tenths of their following of clients. While we are commendably anxious to avoid encouraging foolish litigation, we should also avoid suffocating a good case by a premature opinion. We are neither judges nor arbitrators. We can only decline a retainer when it clearly appears that the client has no case. We should be as sure of his having no case as the law requires the jury to be of the guilt of the prisoner before they convict him. It is far more difficult for the lawyer to reach the needed degree of certainty than the jury, for he hears only one side and often he cannot accurately test that. If the case offered is *prima facie* maintainable, we are not to turn it off. If it is doubtful, we must consider of it until we come to a definite conclusion. Lord Eldon, the hesitating and doubting Chancellor, felicitated himself that his reprehended dilatoriness and looking over of the original instruments had saved many a landed estate to the true owner. We should permit neither our needed promptness in deciding, nor our firmness for what we deem the right, to deprive a client who trusts us without limit of some right which better

attention might have ascertained before we influenced him to decline controversy. And we must say, as we have already said, that this full knowledge comes rather from industry and an energetic addressing of all the faculties to the case at the first, than from long delay and lazy contemplation.

§ 82. We will now briefly consider the often urged right of a party to force any case upon a lawyer, and what moral principles should guide the latter in his conduct after employment. This is a branch of what is frequently called legal or professional ethics. It has received much good discussion,¹ but some confusion yet prevailing may be removed by bringing forward a few distinctions which have been too much overlooked. We set out with persons charged with crime. As it is the rule that the evidence must prove guilt beyond a reasonable doubt and that a conviction is to be had in due conformity to far more strict requirements than obtain on the civil side, the reflecting people of the world are almost at one in embrace of the proposition that such persons can command for their defence the services of those members of the bar who engage in criminal practice. The prisoner who is too poor to pay a fee has counsel assigned him by the court. The professional effort which can be exacted is, that the prosecution be held to due process of law. If a flaw can be detected in the proceedings or in the evidence, if a doubt, not of guilt, but of the proper proof of the same, can be fairly raised, the counsel is bound to press these advantages with all achievable effect, and cause if possible the acquittal of a man whom he may

¹ See the views of David Paul Brown, 2 *Forum*, 25 *et seq.* But the best consideration of the subject known to us is Mr. Warren's *Law Studies*, 3d ed., 374-444 *q.*, of which note what we say, *American Law Studies*, § 50.

know to be in fact guilty as charged. If he halt or recoil in this duty, he may receive the plaudits of a few shallow sentimentalists, but he draws upon himself execration of his treachery and desertion from all the better part of the profession.

§ 83. But now let us look at another sort of cases. A practitioner, known as "the divorce shyster," contracts with a party who seeks without legal reason to dissolve his marriage. A flying visit is made to the locality of a distant State where it is purposed to bring suit, which is treated as a change of domicile, while the client is back pursuing his business at home ; then sham service of the defendant is effected and returned as legal, though she has never heard of it ; and at the last there is a judgment releasing the plaintiff from the bonds of matrimony. Every step was taken, not simply with the full knowledge, but by the advice and active procurement of his counsel. Surely it is palpable that such a case should be declined when offered, and, further, what is done by the lawyer after accepting the case merits disbarment and a long term of hard labor.

§ 84. To return for a moment to our first subject of illustration. There is a wide-spread opinion that many criminal practitioners abet the procurement of false evidence, and become adepts in obtaining for their side all the benefits of embracery without suffering its pains and penalties ; and these acts are condemned as severely within the profession as by the most censorious without. This introduces an important distinction, which is, that, while there may be a case the offer of which a lawyer is not warranted in refusing, yet he cannot be coerced to conduct it in any other way than is legitimate and honorable.

§ 85. We have mentioned the divorce case which no reputable lawyer would be asked to take. There are others which, though not obviously as bad, yet ought to be scrutinized to see if they are honest. Bankruptcies and failures in which the debtor keeps his estate and gets rid of his liabilities; claims to property against creditors of the late owner by his near relatives;—these fall far short of complete enumeration of the instances in which a party is consciously trying to cheat and rob. If his lawyer is aware of his motive and of facts showing the prosecution of the case to be corrupt, and he still helps the client on, he becomes as bad as the client, or even worse. A stranger came into the chambers of a leading lawyer, told his case, and tendered a heavy retainer to have suit made for the property he claimed. The lawyer, who was unwontedly perspicacious, suspected from the narrative that the claimant had received virtual compensation. So he questioned hard, and drew out an admission of the fact. The compensation—it is unnecessary to explain here—had been informal, and the claimant still held the naked title. “Why should you sue for property for which you have been paid?” was asked. “O,” was the reply, “I choose to insist upon all my legal rights.” The lawyer broke into a rage, and he ordered his would be client off, with the remark that he must find somebody else to aid him in his d——d villany. This exemplifies the promptness with which you should always fling away a knavish case.

§ 86. So much for causes and practices that morality commands you to avoid. Next comes the case which is not dishonest, but which you see is hopeless. What are you to do here? Suppose that it is a declaration or plea palpably open to a demurrer sustained by the plain letter

of the statute or the plainer doctrine of the decisions. Of course you ought to be round with the client, telling him emphatically that it will be foolish for him to go on. What if he still insist? as I have known wrong-headed people to do. I am clear that you should decline to make a fool of yourself.

§ 87. But this does not apply to any but cases surely desperate. David Paul Brown tells the following: "A young member of the bar, who has since reached some eminence, when applied to in a first case, which was somewhat complicated and doubtful, waited on the late Mr. Rawle, stated the case, and remarked at the same time that he thought it a bad one. 'You are,' said Mr. Rawle, 'a presumptuous young man, thus to venture in the outset to determine what a court and jury only can decide after hearing all the testimony.'" And Mr. Brown quotes approvingly the well-known suggestion of Judge Sharswood, that cases are to be decided according to the fixed and unbending rules of law and not according to any mere notions of justice held by courts and juries.

§ 88. Legal rights, not moral rights, are the due of every client from the courts, and of course from the lawyers, who are but their officers and cannot put themselves above the judges. The most just debt will be barred by the statute of limitations. Many an instrument for which money has been paid, or for the setting up of which there exist other high claims of honesty, is avoided every day because of the lack of some formality. The client can exact of you the benefit to him of all such points. But you are not to help him by fraud, nor are you, by concealing or feigning facts, to make out such a case as will bring him a false verdict.

To sum up, if the facts give him or seem to give him *prima facie* a case recognized by the law, whatever morality may say of it, you cannot rightfully disobey the order of the client to do your utmost to win it for him.

§ 89. Sometimes the application of these principles will not be clear. Now and then you will have offers which must be decided rather by your feelings than your understanding, where the question is akin to those others of sound discretion and enlightened conscience, such as the requisite reasonable doubt in criminal cases, or the right amount of punitive damages in some kinds of tort, or whether a judge shall grant a new trial because of the alleged contrariety of the verdict to the weight of the evidence when it has some manifest support.

We may note that if you show unalterable convictions against the case, or the particular way of management on which the party has set his heart, he will hardly ever insist upon employing you. Choate did not actually decline to defend Professor Webster, but he dissented so vigorously from the proposal of the defendant and his counsel to make the main struggle upon the identity of the remains found in the furnace with those of Dr. Parkman, that, to use his own phrase, they did not want him.¹

§ 90. I advise that, whenever you decline a case because you deem it unmaintainable, you disclose your reasons fully to the client and advise him, should you be in any doubt, to sound other counsel. You can remind him that probably you have unwittingly become prejudiced against his case and you are therefore a bad lawyer for him. Keep a record of the cases you discourage after full investigation, and of their final results, and you will find that in the long

¹ Neilson, *Memories*, 18.

run you take ten cases which you should not to one that you turn off mistakenly.

§ 91. There are many lawyers who are too much in court to originate any business. They are generally retained after the issue has been joined. The responsibility of bringing the action or of making a defence has been previously undertaken by a junior. The senior should, at his earliest opportunity, pry carefully into the case in order to learn if it can be upheld. If it cannot be, he should advise a settlement or abandonment. Often, however, the ability of the junior is a sufficient guaranty of a good case.

§ 92. We will now notice some cases which give much trouble to the profession. When they are offered, we see that they are supported by the law, the evidence, and right, and yet we know that they cannot be gained in the courts, where witnesses, jurors, and the judge will irresistibly band against us whenever we dare to risk a trial. The client may be a corporation which the whole community think is too rich and powerful to have anything more even of its own. He may belong to a class of society almost proscribed by that class which furnishes jurors, as in some parts of the South for several years after the late civil war it was folly for a native white to submit his case to a negro jury, and in other parts a negro could not get justice from a white jury. In certain places workingmen may be in the ascendant, and deny right verdicts to merchants and professional men contending with one of their class. It will now and then be sheer rashness to carry the just cause of the client into court.

§ 93. Here the lawyer is not to be blamed for being unable to cure society of its evils. He must look about

him and do the best possible. Often a high-toned bar is of great avail against these inexorable prejudices and a composition approximating the right can be secured by its intervention. Sometimes a reference or arbitration can be had, and thus the client acquire something, far short of his due, it may be, yet as far exceeding what he could obtain from the courts. If you can see no help of this kind for him, you should advise him against litigation. But you cannot refuse him your best effort if he decides against your advice. Your conscience dictates that you should do all you can to set up down-fallen right, and it almost reproaches you because you believe your fellow creatures cannot be influenced to help you.

§ 94. We have had an instructive experience upon this subject. When the courts of Middle Georgia in which we practised were reopened after the late war, it was useless to submit the case of a negro to a jury of the whites. We witnessed such an unbroken series of adverse verdicts against colored litigants that, as Jefferson said of slavery, we trembled for our people when we thought that God is just and that his justice cannot sleep forever. But the profession stood by their clients faithfully. Even the counsel assigned by the court to defend the negro pauper did his duty fearlessly and went down bravely under the unrighteous conviction. The leading members of the bar spoke out unanimously on all fit occasions advising a better course. At last this persistence began to tell. The tide turned perceptibly in 1870, and after a while it was no wonder to see a negro obtain his due from a jury of his former masters.

§ 95. In war the post of danger is the post of honor; in the practice of the law the post of unpopularity is often

the post of honor. The weak, the defenceless, and the oppressed are clients that you must stand by to the death. Whether they are high or low, rich or poor, — for unpopular clients come from every rank of society, — they are a sacred charge. You are to strive harder for them than for those who can help themselves. If, after failing to obtain any such amicable adjustment as we have mentioned, you must conscientiously advise them to abandon their rights because of your conviction that the probable event will never repay the cost of the controversy, make everything clear to them. If they still insist upon their guaranteed right of appeal to the courts, you have no choice. Prepare and try their cases. Fear not to be called Quixotic. You work not alone for them. The brave soldiers who fall in the forlorn hope do not throw away their lives. You struggle for the most precious interests of society. Grudge not the toil and defeat, rewarded as it seems with only present obloquy. It is the sure earnest of the everlasting amelioration of our race that men will take fire and imitate actions brave and good. Your example inspires others. The better ones begin to organize. And when their organization is complete, no power of injustice can stand against them.

§ 96. We contend that the principles which we have laid down should govern every one to whom a case is offered, whether he be some hard-working junior first consulted, or a more eminent lawyer retained after forensic controversy has been commenced. And we here summarize the leading divisions of the examination which we have treated in this chapter: —

1. The facts are to be found out. All belonging documents are to be considered with a sharp eye to their rele-

vant contents, the validity of their form and execution, and the means of proof. The entire array of witnesses who can possibly testify to important matters are to be questioned exhaustively, in order fully to disclose both their favorable and unfavorable knowledge. Those that cannot be seen in person must be written to, or be sifted by an efficient agent.

The expected proof of the other party, whether documentary or oral, — this is an indispensable part of the facts to be learned as well as can be.

And the whole body of the evidence, so far as it can be collected now, is to be weighed according to probabilities and applicable rules of law and made to tell its true tale.

2. When a definite narrative, as it were, is fashioned from the facts on both sides, the test of the law is to be applied. Do these facts constitute a claim to a substantive legal right, or do they not? and is there an available remedy to obtain or defend the right?

3. When the course we recommend has been rightly followed, the experienced counsel can predict the result of litigating the given case with some degree of confidence. If he keep the mean between an over-sanguine expectation on the one hand and a seeking for more than a strong probability on the other, and he divines clearly that the chances of success overcount those of failure, he should advise litigation; but if the chances of failure appear the greater, it is his duty to dissuade the client from appealing to the courts.

§ 97. This summary is but a condensed statement of the more general principles. All the minutiae of the proper consideration of an offered case will be learned, both in

their separate importance and proper co-ordination, when the subject of Preparation is fully developed.

§ 98. But, says the young lawyer, How can I ever find out, at the first, all about a case as you direct me to do? and if I do find out all of the facts and details, how shall I ever learn what to do with them? how can I understand what case they make?

He must observe and imitate for a while. His old preceptor will always rejoice to give him instruction. Some young brother of the bar, a little older in the law, will be glad to play teacher. And our jurisprudent, if he be a born gentleman, will find friends among lawyers who will help him with good counsel and prevent him from disgraceful blunders. Let him attend trials, noting everything most carefully, and reflecting to see how it was brought about. Let him put cases to his companions and argue with them. And especially let him give some industrious hours every day to his exercises on the reports.¹ After a while he will become capable of analyzing cases for himself and discerning whether they are maintainable or not.

¹ Note our American Law Studies, §§ 239 *et seq.*, 272-279, 481, 727, 779.

CHAPTER II.

PRINCIPLES OF PREPARATION. — PREPARATION OF THE EVIDENCE.

§ 99. IN this chapter and the two which succeed, we treat of the preparation of the case on the evidence and its preparation on the law. Afterwards we notice the proper plan of an attack or defence. It is necessary to discuss other matters belonging to our general division of Preparation, most of which head different chapters. We wish to impress it upon our student here, however, that there is actually no such serial progress. The parts of a thing, even when they are coexistent, must be looked at separately to be understood. When the case is presented there is almost at once some immature conception of the cardinal questions of law and fact, and of the proper plan of conduct, and they are steadily developed into greater clearness and distinctness. And though the various items of preparation in their growth keep an even pace with one another, still we must consider them successively in order to present more intelligibly the whole which they constitute.

§ 100. The lawyer deciding upon litigation has analyzed the case and made choice of his forum and remedy. He has discovered all the material points of controversy which can be discovered at the standpoint of the last chapter, and he can commence making rational provision for the

decisive encounter. We must, however, emphasize the fact, that the most careful consideration of a case offered often amounts to no more than a bird's-eye view of the prominent particulars, many smaller ones being left unascertained. And further investigation, the manœuvres of the adversary, sudden and surprising developments of many kinds, — all these may contribute new facts and points of leading importance. Of course these new facts and points ought to be studied as carefully as those which the lawyer passed in review before he advised the action of the client.

We say this to hint the wide scope of our present subject, and to remind the student that in many cases much is to be done which cannot be foreseen at the first. And we must now proceed to discuss the different aims of intelligent preparation. In the rest of the chapter we shall confine ourselves to the evidence.

§ 101. The first of the aims just mentioned is to assure those advantages which appear when the case is taken. We will begin with the witnesses. What we are now going to advise is often properly done while the lawyer is considering the offered case, but it is also such a material particular of preparation that it must receive a place here.

The client, or another, tells you that somebody will testify so and so, and you see that the testimony as represented is material. This witness should be brought to you without delay, and you must make yourself or have your associate or clerk to make a copious memorandum of his statements. You will remember that Quintilian gives similar advice.¹ The careful examination of the witness will

¹ *Ante*, § 50.

be of great profit to you in more than one respect. In the privacy and command of time which you have in your conference you will sift him thoroughly. His freedom from embarrassment will be favorable. You can correct his mistakes. Should he make an erroneous statement in public he will hardly take it back ; but in your office you can lead him to retract an untrue assertion. You may obtain from him clues to other helping evidence. It is also an advantage that you commit and fasten him to his narrative. For sometimes a witness is wavering. When the transaction is fresh he is full of nothing but its actual details, but frequently he is disposed afterwards to alter his first report. He may begin to recoil from the effect of his testimony upon the interest or feelings of the opposite party and his relatives and friends, and he is usually influenced by their appeals and solicitations. All of us have observed that the testimony of good men is shaped and colored by their associates. You will sometimes find that the others, while testifying to the same facts, repeat many particulars of the first witness, although they may have been excluded from court during his examination. This is because they have talked over the matter together, each desiring to avoid being contradicted by the rest. Many times the others labor to reproduce the narrative of the one of most intelligence and standing ; and he may be strongly biased, for all of his seeming frankness. You have a multitude of reasons for being in haste to make your slippery witness sure and steadfast. Get from him the whole truth and nothing else, and see that he agrees to your notes. It is often well to have him sign the minute which you have made.

§ 102. We subjoin a passage from Sir George Stephen which differs decidedly from the advice just given. The

reader is reminded that Mr. Sharpe is an attorney, not a counsel.

"At one time I made it a habit to take out ink and paper and reduce at once to writing all that my witnesses stated, while they were still with me ; sometimes I do it still ; and where it can be effected without exciting alarm it is a useful practice ; but I was cured of it as a habit by more than one instance of the following kind : —

" ' Bless me, Mr. Sharpe, what are you doing there ? ' "

" ' Only making a minute of your evidence for counsel. ' "

" ' Minute of my evidence ! I won't agree to that. ' "

" ' Why not ? You can't think that I can remember all we have been saying ? ' "

" ' I can't help that ; I'm not going to swear in black and white ; I have told you the truth, but I'm not going to be taken down. ' "

" ' Will you write it yourself ? ' "

" ' No indeed ! I may have made a thousand mistakes. I'll do no such thing. ' "

" ' Come now, be reasonable ; what is the use of your telling me all this if it is to go no further ? and how can I make use of it if I am not at liberty to take notes of it ? ' "

" ' That's your affair, not mine ; I have nothing to do with it. Give me that paper or I'll not say another word. ' "

"And I have been obliged to surrender my memorandums as a peace-offering to secure further communication ! All this is prodigiously absurd ; but it is our lot to deal with the absurdities not less than with the passions of mankind." ¹

§ 103. I say, in contradiction of the above passage, that I have taken down the statements of many witnesses with-

¹ Adventures of an Attorney, Am. ed., 294 *et seq.*

out having a single one to object. Nor have I ever known one to decline to sign the abstract of his testimony. Sometimes a witness has required as the condition of his signing that he be furnished at once with a copy.

§ 104. In the following excerpt Mr. Warren tells how a witness was effectually committed against his bias.

“An action was pending upon a promissory note for a large amount, which had been given to the lender by the principal debtor, and the defendant (his aunt) as his surety. The former became insolvent, and the payee . . . immediately sued the surety, who was a responsible person. The plaintiff however found himself suddenly encountered by a serious difficulty in showing the signature to be that of the defendant, whose niece, it seemed, had signed it, in her aunt's name and by her express direction. The former was now disposed to deny having had authority for doing so ; and no one else had been present at the time of the signature but the insolvent principal debtor, whose evidence was expected to be also hostile. It suddenly occurred to the plaintiff's attorney, in this dilemma, to go to the Insolvent Court and oppose the insolvent's discharge, in order to have the opportunity of examining him quietly upon the matter, without his being aware of the true object. This was done ; and there was adroitly extracted from the unsuspecting insolvent, upon oath, a clear acknowledgment that he had heard the defendant authorize her niece to affix her aunt's signature to the note, and he had seen the signature affixed accordingly. A day or two afterwards the astounded insolvent was served with a subpoena to prove this fact on the trial of the cause ; and the instant that the defendant's advisers heard of that circumstance, they succumbed, on the very day of the trial, when the cause was

on the eve of being called on : the defendant unexpectedly submitting to a verdict by consent for the full amount, which was duly paid. But for this ingenious manoeuvre the plaintiff would in all probability have been unjustly defeated.”¹

§ 105. Probably the most common mode of securing doubtful testimony is to have the witness repeat it in the presence of persons of good character. The fear of being contradicted by them will generally keep him to this narrative.

And we suppose that every careful lawyer can recall some instance in his practice when he took time by the forelock and obtained from an anticipated witness a letter stating what he would testify, before any warping influence had begun to work on him, and he afterwards saw that the witness regretted writing that in which the truth was poured out so unrestrainedly.

You will now and then have an opportunity of taking an affidavit to support the allegations of a bill in equity, or an answer thereto, by which you have the affiant put himself down in black and white.

A person once professed himself ready to support certain statements in a bill for injunction which I had every reason to know were true ; but he was sent off in order to consult a memorandum and refresh his memory of other facts which it was desirable to prove. During his absence he fell under hostile influences, and when he returned he could recollect nothing at all. Had such an affidavit as he could then give been promptly taken at first, a most material preponderance would have been gained for the complainant.

¹ Law Studies, 3d ed., 462, 463.

§ 106. The written evidence requires a word. In some places, where the court and registry offices have insufficient protection against fire or thieves, it is often prudent to get as soon as you can a duly authenticated copy of whatever document or record in these offices is of importance to you. And there are many relevant private writings of which you cannot acquire the custody, such as unrecorded conveyances and agreements, letters, accounts current, entries in books, etc. You should at the earliest opportunity have accurate copies made of these and provide yourself with sufficient proof of their accuracy, this proof to be used in case the originals become inaccessible.

§ 107. Having set forth the general modes of ascertaining the narratives of witnesses and confirming them in the same, and of collecting the written proof and placing it beyond the chance of concealment or destruction, we will now consider the next stage. This is to obtain the proper process for compelling the attendance of the witnesses and the production of the documentary evidence. Subpœna, duces, notice to produce documents, — these suggest the means most commonly used. And it must not be forgotten that there are many witnesses, such as females, and males residing out of the county or district, whose testimony can only be coerced, in civil cases, by suing out a commission. The law of the State, or the federal law-books if the case is in a court of the United States, usually contain full and precise directions, which should be conformed to in all these matters.

§ 108. It is often a question of policy whether you shall avoid the disclosure which will necessarily be made to the adversary by your resort to some of the means just enumerated. It may be better now and then to rely only upon

the promise of a witness to attend, or that of a possessor of a document to produce it. The subject of keeping one's important secrets will be specially considered after a while. But ordinarily there is no good reason to fear such a disclosure and it is but proper diligence to sue out the process and have it executed at once.

§ 109. We must say a word of your duty when you have but a single witness to a material point, or some of your important witnesses are of infirm health, — a subject which really belongs as much to the first division of this stage of preparation treated above as to that now in hand. The process of the court does not run into the other world, whither they may have gone when you would swear them. In all the instances just supposed, it is the right course to have the testimony perpetuated in the most expeditious way allowed by the law. The family of the client may then be protected after he, his witness, and his lawyer are in their graves. We suggest that you should have all the important witnesses for the defence of a client charged with a crime who are not likely to live long to testify in full at the examination of your client by the magistrate, as he is required to make a minute of the evidence, which minute can be used afterwards if the witness cannot be had. Likewise, when a witness has been examined in a civil case, if there is another trial of substantially the same issue between the same parties, his testimony can be proved, he being then dead or inaccessible.

§ 110. The second object of an intelligent preparation is to obtain if possible additional advantages. A mine of facts is often inexhaustible for a great while. Note some contested question in history, — how centuries will pass away before it is settled. Many of the pertinent particu-

lars are dispersed or concealed, and it requires time to collect or discover them all. Some of them, though known in a measure, have never been fully understood. So with the facts of a case. Your vigilance and search should never end. Strive to learn more and more. Scour every possible nook and corner where evidence may be hidden, and you will often make favorable developments which will astound your client. As preparation goes on, it reveals sources of information not even suspected before. Thus you may detect a bias warping the adverse witnesses, which, if it can be proved, may unload their testimony of all its weight. You may find out that a grant on which the adversary relies is a forgery, or that a deed supporting his title is void, or that a very formidable witness has given in the hearing of credible persons an account of the transaction contradicting that he is now expected to make. Time does not serve to enumerate instances of the advantages which may be acquired after you have begun to prepare your case. The trial itself — when, as you believe, you have exhausted and drained dry every fountain of relevant evidence — will often give you hints from which you may profit, even before it is concluded, to the strengthening of your case.

§ 111. We will enforce our counsels with a few examples.

An experienced practitioner, as he told me, once had great need to ascertain who had drawn an instrument which was then the subject matter of important litigation. He had used the information of his client, who was the executor of the person for whom the instrument had been drawn, and he had inquired wherever he thought it at all probable that he could learn anything of the matter, but

failing everywhere and thinking of no other possible chance he had given up in despair. Soon afterwards, being engaged in the trial of a cause in a distant county which he had never visited before, while listening to the examination of a witness by the other side, he heard some one behind him whisper of the instrument to another. He pricked up his ears, and the talker said that the first money he had ever made was by copying it for —, an eminent counsel known to our lawyer only by reputation. The secret was thus casually discovered. Upon corresponding with the draftsman his testimony was found to be most material, as anticipated. Our friend confessed that, after he had thus obtained what he had so long desired, nothing could seem more natural than that the instrument should have been drawn by this very counsel, and that had he rightly reasoned from his information he would have discovered the fact months before he did.

§ 112. The collateral heirs of an intestate who had left a large estate had brought a bill against the administrator. To the great surprise of the complainants, the answer of the administrator set up a claim against the intestate larger than the estate. There was no mention of this claim in his returns, as there ought to have been under the circumstances had it been genuine ; and the counsel for the heirs had other reasons for believing it an invention. But as the defendant was a popular man and had always borne a good reputation, it was plainly necessary to add, if possible, new support to the bill. There had been several full consultations with one of the heirs after the filing of the answer, and she at last declared emphatically that she had disclosed all of importance that she knew. The administrator was her brother, and the two had long lived in dif-

ferent counties. Reflecting upon this, and upon the fact that the administrator had been suable for several years before the bill was brought, the leading counsel for the heirs inferred that the sister must have received some letters from the brother of which good use could now be made, and he had his junior to visit her again. She could recollect no letter, and she could hardly be induced to make a search. But she was at last made to find a letter. It had been written soon after the qualification of the administrator, and it was a lengthy summing up of reasons why the sister could get nothing from the estate. There was not the slightest hint in it of the claim mentioned above; but on the contrary it contained certain expressions which negatived its existence. Of course this letter proved of great service to the heirs.

§ 113. The last instance which we give here shows that sometimes the progress of the trial affords good opportunity to get new and important evidence.

On the trial of an indictment for burglary, a witness testified that, having been delegated by his employer to watch the premises, he had concealed himself under a house, and while there he saw the defendant standing at that door of the neighboring building which had been broken about the time the offence must have been committed. Under the cross-examination the witness was made to locate himself precisely at a certain pillar supporting the house. A reputable man was slyly procured to put himself in the place, and he returned in time to prove for the defendant that one in such a position could not possibly see the door in question. This testimony destroyed the credit of the State's witness.

§ 114. The third object of preparation is — anticipating

your adversary's case, as will be explained hereafter — to cripple him and abridge his advantages. For instance, there may be strong popular feeling prevailing against a client charged with a great crime, and if you can procure a continuance the passionate prejudice giving the Commonwealth the superiority may subside before the trial. Here you must stand ready with a proper showing, if possible. Again, you may be aware of overwhelming evidence against you, while the adversary has not discovered it. By adroit management you may conceal it effectually, or you may force a trial immediately; and he may in neither case ever discover it.

§ 115. The following is an example of neglecting an opportunity to cripple the adversary.

A statute permitting parties to testify made an exception where one of the parties to the contract or cause of action was dead. This was held to exclude the living one only when the estate of the dead party would be directly affected by the judgment in the particular case. In an ejectment where the plaintiff was re-entering for condition broken, he could prove the breach only by himself. The defendant had purchased from one deriving title from the plaintiff. The man to whom the latter had conveyed on condition was dead, and had his representative been vouched by the defendant as a co-warrantor and made a party, the plaintiff would not have been competent under the local adjudications to prove the breach, as the judgment would then have affected the estate of the dead party. Omitting to vouch the representative of this warrantor lost the defendant the case.

§ 116. One of the most common instances in practice of embarrassing your adversary, is to make out a *prima*

facie case if you can without examining a person who can testify strongly for you and who must be called by the other party. The latter by calling him makes him his own witness, whom he cannot discredit, and on the cross-examination you will elicit all of his favorable knowledge.

There is often opportunity to draw away from the adversary some of his strong supporters. It may be that a joint party, or the relative or employer or friend of a party, may be brought to form an alliance with you, in which case you may have an accession of testimony. The longer you practise, the smaller will be the proportion of witnesses you meet whose testimony is not colored by their interest and affections.

§ 117. We have enumerated and briefly treated the three general objects of preparation. The student, from his own observation or invention, will supply many more instances than those which we have given illustrating each one of the three divisions. And he must leave it to further study and the teachings of practice to give him a firm hold of the important parts of the subject we have just had in hand. We go on to treat some of its other parts for which we could not find a proper place heretofore.

§ 118. Your preparation should not be allowed to hurt the client. If the lawyer is careless he will often produce evidence which will be turned against him with damaging effect. He should seek to avoid conflicts, contradictions, and aid of the adversary in his own positions and evidence.

We will give two instances of a party's injuring himself rather than his adversary by his own evidence.

The first was on a caveat to a will propounded for probate, the issue being whether the witnesses signed in the

presence of the testator. There was no doubt that he and all of the witnesses were present when the execution commenced, but the caveators contended that he left the room before the witnesses signed. The recollection of the subscribing witnesses was not clear, and the court held that by reason of this testimony there was a *prima facie* presumption of due execution. To rebut this presumption the caveators read the testimony of two women which had been taken by commission. These two were in the room during the execution of the paper, and both of them testified positively that the testator went out in company with themselves before the subscribing witnesses had signed. This testimony seemed to overwhelm the propounders; but when it was criticised it was shown that in every other respect save that they carried the testator off before the subscription by the witnesses these two were in irreconcilable conflict with each other. One said that the testator accompanied her and her companion to the room, while the other said that the testator was already in the room when they came and she did not know whence he came. They disagreed as to the order of leaving. One said that the testator went out with the two and at her side, the other said that he came behind them. According to one of them the two went out into the hall and passed up to the door of the sitting-room, where they stopped; the other carried the whole party at once into the sitting-room. Again, each one of them was at variance in other particulars with the weight of the evidence; in many instances the variations being trivial, to be sure, but yet of great importance for testing the accuracy of their memories. The paper, at the time of its execution, was primarily intended as a settlement, and it was not known by the subscribing

witnesses nor the women to be also a will, and none of them pretended to have closely observed the details of its execution. Many years had elapsed since the occurrence under investigation. One of the women was interested with the caveators and the other strongly biased in their favor. The jury could not trust their memories in the solitary particular where they agreed, and they found a verdict setting up the will.

Now had the counsel who prepared the evidence for the caveators done his duty in carefully sifting the two women before they testified, he would have discovered these conflicts. His course would then have been plain. He would have got a commission for and examined only one, selecting that one who had no interest in the event of the case.¹

§ 119. The other illustration occurred in the trial of an action which a local statute permitted to be brought by the heirs at law against the administrators of the intestate and their sureties. The defence was the general issue, denying every part and parcel of the large waste alleged by the plaintiffs. An experienced lawyer, who specially represented the sureties, offered a voluminous transcript of documentary evidence, by which he apparently set great store. It was received without objection, the reading being waived. His discomposure was very great when the opposing counsel, in his argument, showed that this transcript, among other things, contained proceedings taken some years before by these very sureties against these same administrators, wherein a receiver of the assets of the intestate's estate was appointed by the present counsel of the sureties, who was at that time a judge. The sureties had

¹ Had the witnesses been examined together, as might have been done, perhaps there would have been less contrariety in their testimony.

obtained the appointment of the receiver by complaining of the same waste which they now denied. Of course this evidence should have been omitted, as there was nothing in the whole of it to compensate for the damaging effect of the appointment mentioned. It gave the counsel for the plaintiffs a great moral advantage which perceptibly cowed his able adversary.

§ 120. The one sure preventive of such self-caused injuries is a careful contemplation and study of all the details of a case during its preparation. Not only should every parcel of the evidence be studied and construed as if detached from the rest, but its effect on the whole must be understood. And this should be done before the evidence is made accessible to the other party. It is disgraceful stupidity for you yourself to arm your adversary.

§ 121. You must stand on your guard against the efforts of the adversary, divining his purpose and preparing against it. You must make him disclose his hand, using however no discreditable artifices or tricks. A lawyer is not to eavesdrop or listen at keyholes. There are honorable ways of acquiring a knowledge, more or less accurate, of the designs and doings of the other side. Further testimony, both oral and written, comes to light during the investigation, and you see that it will probably be used by him. And it is not women only who are unsecret. Generally, men engaged in any controversy which involves much feeling, as is usually the case in litigation, are prone to predict success for themselves and explain to their hearers by what evidence and legal principles they expect to win. Lawyers as a class are communicative. And cases that turn upon disputed facts usually divide witnesses into parties who talk and argue with one another. To profit by this, you

should depute your coolest-headed witness to get an accurate report of what the opposite witnesses say that they will swear. We have known this stratagem to succeed more than once. Witnesses in general become partisans. It does really seem that many of them feel bound to give their good wishes wholly to the party who has subpoenaed them. They will often go great lengths to serve their friends. Amid a considerable number, there will nearly always be one qualified for making the report just mentioned; and you will often find that, when you have reflected over what is reported, much of its formidable character can be removed by a cross-examination judiciously planned, or that you can easily provide counter testimony to overwhelm it.

§ 122. The unadvised talk of the adversary, his lawyers, witnesses, and friends, is not all that you must attend to. His pleadings, and the amendments thereof from time to time, his resort to new remedies, his application for subpoenas, commissions to examine witnesses, orders, etc., the proposals which he submits and the waivers he solicits, and all his movements, should be carefully observed and thought over. They will often throw a bright light upon designs and operations which he believes are known only to himself.

§ 123. And you should consider if there be any remedy or move open to you by which a disclosure can be forced. There are correspondences in litigation to the armed reconnoissances of warfare. Thus, by a motion to dissolve an injunction when the answer swears off the equity of the bill, you may drive the complainant to a support by affidavits which will accurately inform you of much of his testimony.

Again, you may be defending one charged with a crime and arrested on a warrant before indictment found, and by refusing to waive an examination and give bail, as the local law often allows, and making a stout contest before the magistrates, you may draw out the whole case of the State, keeping your own back if you choose.

One of the advantages of holding the initiative is, that when you prove a *prima facie* case on the trial, the adversary must offer overcoming evidence in order to avoid an adverse verdict, while you can dismiss if you are afraid to risk the jury ; and perhaps you learn from this observation of his proofs how to be the stronger after your renewal.

It is not needed to exhaust the illustrations which the law of procedure affords. It suffices to say that it gives everywhere to the practitioner remedies which he will often use wisely for no other purpose than to reconnoitre or feel of his adversary.

§ 124. We must not forget to say that no professional man in America has so many warm personal friends as the lawyer. They take a pleasure in giving their favorite all the information possible in his cases, often doing for him what they would not for the client.

§ 125. By reason of the different means enumerated above, the secrets of almost every case are revealed before the trial. At least they are told to those who know how to listen for them. As they come out, part by part, scattered here and there in different places, it may be over a large neighborhood, it is the duty of the lawyer to collect these fragments, put them together properly, and learn what mischief is plotting against him. And he must disprove as far as possible every material particular of evidence which he anticipates will be advanced by the

other side. Care on this point is indispensable to the proper conduct of a trial.

§ 126. It is often politic, as we have hinted, that you conceal your purposes and proof. This is not always so, for it is now and then the more successful course, as is usually the case when you are opposed to great frauds or heinous crimes, to play with an open hand and make the sympathy of all good people active for your cause by disclosing your strongest evidence. But as to proper concealment we begin by cautioning you not to talk to your client too freely. You need not tell him your plan and anticipations, even when you have him executing the one and providing against the other. He is often leaky and over-talkative. In litigation, secrecy is sometimes of as much avail as it is in the project and movements of a campaign. Let your knowledge of human nature and what you deem the true interests of the case settle for you whether to make a full confidant of the client or not.

§ 127. When it is the true policy the prudent practitioner will guard against the escape of his secrets, not trusting client, friends, witnesses, or his *imprudent* associates overmuch. Sometimes he needs to be very ingenious to succeed. He had better talk with his witnesses separately, and out of the hearing of his client if the latter cannot exercise reticence. If he discovers that the adversary has set a trap to catch some of his secrets, he should make a dupe of him. The laws of civilized warfare, though demanding of the combatants the strictest observation of all the requirements of a sound morality, permit to both the use of honorable stratagem. No faith is to be violated. What you do should not shock the conscience, it should only deceive the head of the enemy. If the trust of the

adversary is invited, as where a composition or an accord is proposed, the utmost truthfulness should characterize all communications. But when he chooses to scrutinize your actions with a view to divine your purposes, you are under no obligation to help him discover what it is your interest, right, and often duty to keep dark, and he cannot complain if by your actions you mislead him. He is not to force his credulity into your keeping as his trustee. One of the objects of stratagem is to mask your purpose, whether it be attack or defence. The pleadings, even when most accurately and technically drawn, hardly ever advise the other party of more than the general nature of the defence or attack preparing. The plan of either side is to be looked for elsewhere. Your adversary will have both scouts and spies in his pay, and you are at liberty to befool them by any ruse which is not a breach of honor. You can keep from the witnesses whom you sift in your office the points to which you are really examining them, by questioning with apparent interest about many other things. You can hide your real plan from your client, and if his confidants are entrapped into reporting what they suppose to be your designs and line of operations and thereupon the adversary shapes his course against what he has mistakenly conceived to be your case, he can ascribe his consequent disaster only to himself. He trusted his own judgment and it deceived him.

§ 128. We have considered the stratagem which foils the adversary prying into your secrets. There is another by which you seek to create a false impression of your object. The most common instance is where you subpoena one whom you know to be an adverse witness, intending to excuse his attendance when it is too late or impossible

for the adversary to have him. There is an infinite variety of ways to disguise your true aim under the pretext of a different one. The circumstances of the particular case dictate the proper stratagem.

It must be remembered that stratagem is a game which two can play at. Beware that you are not caught by those of the opposite side and that you do not yourself fall into the pits that you dig for others.

It is also to be said that it is more and more demanded of parties and their counsel that there be no suppression of the truth and no deceit. Where the other party is unscrupulous and he possesses large resources of testimony in a numerous following, or where popular prejudice is unjustly against you, and perhaps in other instances, you will generally find it necessary to keep your plan closely, to hide the decisive evidence upon which you rely, and to mislead the adversary as to both. But we strongly believe that there is an increase in average litigation of controversies between honest litigants, who desire only that the full merits of each side be compared, and that the one prevail which is found to be in the right.

§ 129. Returning to the general subject of the chapter we remind "our jurisprudent" that the law is the great guide to the lawyer in the preparation of his cases, even in the matter of evidence. He finds it necessary, it may be, to prove the death of some particular man; he has no witness to testify to the fact desired, but the law permits him to raise the presumption of its existence by showing an absence of the person in question for a certain number of years without having been heard from. The books contain minute directions as to the proofs required to support particular actions and pleas. There are also rules for

weighing evidence : thus positive, other things being equal, will overcome negative ; an unbiased witness is more credible than another to the same fact who evinces an evident leaning towards one of the parties. It is not our object to compile the law. We must take it for granted that our student knows its general principles. And we earnestly insist that even in seeking after superiorities of evidence his Stephen, Greenleaf, Wharton, and Abbott be reinforced by the digests both general and special, and especially that the reports of his State be constantly looked to for guidance. It is true that the law of evidence grows more and more liberal, assimilating itself year by year to that logic which, according to the title-page of John Stuart Mill, contains "the principles of evidence and the methods of scientific investigation." Disabilities and incapacities have been removed which the centuries before us worshipped, deluded into believing such suppressors to be the guardians of truth. In our own day we have seen millions of blacks made competent witnesses in all kinds of cases. Still the law is not ready to surrender her supremacy, and unfortunately an argument decisive in the courts can often yet be made from facts perverted and garbled by legal rules which is not a logical argument.

§ 130. We now summarize the more important items which we have been considering.

First. The evidence found to exist when litigation is decided upon is to be put under command. The oral testimony is to be ascertained precisely, and the proper steps taken to fix the fickle or those under an adverse bias or interest by having them authenticate their statements with their signatures or make them in the presence of others. All documents are to be guarded against the peril of removal or spoliation.

As the second stage of securing existing advantages of evidence, the process for coercing the appearance of the witnesses and the forthcoming of the documents must be used. It is also pointed out when testimony should be perpetuated. Blunders here are more unpardonable than anywhere else in the preparation. The duty is plain from the very first. In the subsequent investigation other advantages may escape discovery, in spite of great industry; but if you do not, by using the cheap and easy process of the law, assure those advantages palpable to an average practitioner as soon as the case is presented, the damage resulting to the client is fairly chargeable to your gross negligence.

Second. The practitioner must, if possible, develop a greater force in his proofs than they appeared to have, or he must acquire others. The patient study of the facts in order to get their full meaning is hinted, and detailed directions for discovering and collecting remaining evidence are given.

Third. It is shown to be an object to hem in the adversary and curtail his available supports, and examples are given to emphasize the importance of attending to this duty.

These three are exhibited as the leading constituents of a rational preparation. Then come the following *addenda* :—

1. Warning is given against hurting your client and helping the other side. It is insisted that the issue be so well understood, and the witness or document be so accurately examined beforehand, that no adverse testimony be unwittingly produced.

2. Then the modes of finding out the opposite case and the proper counter measures to be taken by you are reviewed.

3. Next, you are told when to conceal your hand and how to thwart the curiosity of your adversary.

4. Lastly, you are impressively reminded that even the principles of preparation of the facts are derived in great part from the law, the importance of its department of evidence being particularly suggested.

§ 131. So much for the subject of this chapter. The lawyer should prepare upon the facts with unflagging industry. As we have tried to impress upon the student, often after the case appears *prima facie* to be maintainable it requires great labor to detect all of the supporting testimony. You will be led to more and more of it by probing the witnesses, your client, the documents, and the entire sources of information. All of us have noted the shrewdness with which veteran lawyers guess at the existence of testimony. Spare no pains to get the whole. Nothing material, whether apparent at the first or afterwards found, should be thrown away. An item light and trivial of itself may turn the scale. Remember the maxim of Napoleon : "When you have resolved to fight a battle, collect your whole force. Dispense with nothing. A single battalion sometimes decides the day."

Mr. Warren gives advice similar : "Always *over-prove* rather than *under-prove* your case. By this I mean that, when you have got so far in a cause as to the point of trial, you should not peril all that you have already expended and damage your client's interests and your own reputation by niggard considerations of expense in providing proofs of your case. Five or six pounds may, as it were, *insure* you against defeat, by excluding all fair chance of deficient proof. It is much better to have secured a verdict burdened with the cost of a superfluous witness,

but whose testimony *might*, in some turn of the cause, have been indispensable, than to have lost a verdict which you would have infallibly gained if you had not chosen to run so near the wind and neglected to come provided with proof which might not have increased your costs a couple of pounds, — those even having to be paid by your opponent. There have been very many cases in which a party has *struck* at the trial, especially at the assizes, on seeing his adversary come prepared with such superabundant proof as excluded all chance of a breakdown.”¹

§ 132. We add a word of caution. Beware of diverting yourself and the jury from the turning points by attending to unimportant matters. One who has made a brilliant and solid fame as a lawyer and judge² often tells me that the greatest trouble in practice and on the bench is to get rid of the immaterial, to disentangle the merits from the mass of irrelevancies with which they are mixed up by the testimony and argument. We say plainly what Mr. Warren really means: *over*-prove, if you can, the important and decisive points, and leave all the others to the care of your adversary.

¹ Duties of Attorneys, Am. ed., 181 *et seq.*

² Judge L. E. Bleckley.

CHAPTER III.

PREPARATION OF THE LAW OF THE CASE.

§ 133. IN a great number of cases the preparation of the evidence occupies but little time, while there are also many in which it requires great effort. But be the case a transaction intelligible at the first view to the practised lawyer, or an affair of multifarious details, complicated, scattered, and where many of them cannot be found except by a wise and persevering search; the facts—their complete collection, their proper assortment and classification, and their thorough mastery—are in order prior to any legal inquiry. This is the justification of the place of the last chapter, for it naturally comes just before this which treats of the preparation of the law. The student should learn at once that to be in haste to take up the legal investigation of a case is generally to miss the real points and commit himself to a theory inconsistent with the facts. And when the theory is formed too soon, the facts acquired afterwards will be distorted to suit it. But the special lesson to be taught here is that this premature beginning at the wrong end causes a consideration of irrelevant law questions which is nearly always misleading and therefore worse than useless.

§ 134. The foregoing being premised as to the importance of studying the evidence before determining the law

of the case, we proceed to the special subject of the present chapter. Here the education is properly commenced by a brief contemplation of practice. A young man without this cannot understand us at all. It is by observation and then initiation that we begin to learn at the first, and the same process goes on in many places to the last. Manners, etiquette, command of inferiors, and various other things, are mysteries which can be fully learned only after a season of observation and trials at their attainment.

§ 135. Almost the first remark of the novice who has frequented the courts for a while is that the lawyers wrangle far more as to facts than they do as to law. He notes next that when they dispute as to the law it is more frequently as to the proper application of some legal rule than as to the existence of such a rule. The law slowly becomes more and more certain. The great digests, the repeated revisions and codifications, the multiplication of text-books, and the growth and widening sway of a true science of jurisprudence, are all systematizing it into an harmonious whole. Much yet remains to be done. But no careful observer can compare the present law of many of the States with that of half a century ago without seeing that nearly the whole body of the rules usually administered in the every-day business of society has become easier to find, easier to understand, and easier to apply. The tyro, from the codes and revised statutes, will answer unerringly many a query which years ago would have puzzled the ablest and wisest lawyers. The long arguments of these days are generally in the discussion of the particulars of the case in hand. The treatment of pure law questions is usually short, — shorter now than it was formerly. The tendency is to smaller text-books upon the

older subjects, and to digests such as those of Sir James Stephen. A concise statement of the true law, without discussion, is more and more demanded.

§ 136. To the uninitiated it would appear that the law of the case is by far the more important part of the preparation. But experience teaches that, while the practitioner must know well the law which is of familiar application, his principal business in his cases is generally with the facts. A legal question will be decided by rules with which he becomes better and better acquainted, while every question of fact arising is to be settled by new proofs. It may serve to bring out more clearly the contrast of law growing more certain year by year to the lawyer and facts forever springing up freshly around him, to state that he is to satisfy the court as to the former by the use, day after day, of the same books and texts, which at last become a lesson learned by heart; but to decide the latter, he has witnesses and documents in every case to deal with that he never heard of before, every one of which must always be investigated for and by itself.

§ 137. What we have said in the last sections is true in the average of cases. But occasionally a lawyer gains an unexpected victory by showing that some generally received notion is not law. One of the most famous of such exploits was the success of Scott (afterwards Lord Eldon) in *Akroyd v. Smithson*, while he was young and waiting for business. A testator had directed his real estate to be sold, and the residue of the proceeds after payment of debts and expenses he bequeathed to certain persons. One of these had died before the testator, and in a bill filed, among other things, the lapsed share was claimed by the next of kin. A brief was given Scott for him to consent for the heir at law on

the hearing. But he turned through the books and pored over the question until he became convinced that the share in question was to be regarded as real estate, and therefore belonged to his client. The case came on at the Rolls before Sir Thomas Sewell. The solicitor who had delivered the brief was told by the young lawyer that he should consent that the will had been duly executed, but that he must support his client's claim to the share. He made an earnest effort, which shook but did not convince Sir Thomas, but he learned of a compliment paid by the latter to the argument after his adverse decision. As good luck would have it, there was an appeal by another discontented party, and Scott receiving a guinea brief to consent as before, he insisted on arguing the point again. In spite of the remonstrance of the solicitor, the refusal of the guardian of the client to increase the fee, and the concurrence of the bar in the ruling of Sir Thomas Sewell, he did argue it; and Lord Thurlow after considering for three days decreed in his favor. The argument was published, and, as an old solicitor remarked to him just after it was made, the young lawyer had cut his bread and butter for life. Some time later Scott appeared in the Chancellor's Court of Lancashire to argue the other side of the question. Dunning (Lord Ashburton) told him that he would not hear him; he had read the argument just mentioned and he defied him or any other man in England to answer it. Surely such a failure would delight a lawyer more than ordinarily to win a case.

§ 138. As this case made the fortune of Scott, so did Erskine likewise make his fortune in his first effort by a brilliant speech upon a question of law. But we must remind our pupil that cases of importance which turn upon

a contested rule of law as compared with those involving issues of fact are of rare occurrence.

§ 139. And yet the applicable law must be carefully attended to in average preparation. If you draw a declaration which the defendant may admit to be true and yet can demonstrate that its allegations make no good cause of action, his demurrer will upset you. And if you rely on a plea which the plaintiff's demurrer shows to be bad as a legal defence, he will win. Turn from the pleadings and consider the evidence. Every part and parcel of that has to run the gantlet of Greenleaf, Stephen, and Wharton. The law not only prescribes what is a good cause of action or ground of defence, but it also settles what evidence is to be admitted and what excluded. Every separate sentence in the answers of a witness under examination can raise a question under the law of evidence.

§ 140. In legal preparation you commence with an assumed rule of law, proceed from that to another, and so on, it may be step by step, through many more before you can make good your claim to the desired judgment or verdict. Therefore the aim of preparation as to the law will be that you make no misstep in the whole progress; that you plant your pleadings and evidence, both as a whole and in detail, immovably upon a rock of the law. It is also your purpose, as part and parcel of this task, to show that your adversary has in his pleadings and evidence — either in one or in both — failed to meet your case.

§ 141. To the American practitioner the law exists in three great departments. Enumerated in the order of the frequency of their occurrence in practice, they are State law, general law, and Federal law. The State and Federal Constitutions, statutes, rules of court, and reports are the

authorities which decide questions of State and Federal law, while the general law authorities are English text-writers, statutes, and records anterior to our independence, and the entire reports of all English-speaking lands. In another work to which this is a sequel, we have taken pains to show the relation of these different divisions to one another, to point out how they are to be mastered and what part is played by each in practice.¹ We need only say here that a law question of doubt must be first referred to its proper department, and when that reference is made it is next in order to search the law-books of that department for the desired answer. It is a common experience that a case presents a law question under each one of the three departments. We must also suggest that, when no rule of decision can be found in the books mentioned, the question is generally decided by the reason of the general law, — a subject likewise treated by us at length.²

§ 142. We think it important to impress upon the young practitioner at the outset that it is only in exceptional instances that the law is discovered by theorizing and reasoning. He should abjure the conceit that he can forego enactments and reports and guess at a rule of law whenever he needs to know what it is. Let him always examine the sources, and ordinarily he will there find counsel which commands with almost axiomatic force either to reject or accept the particular proposition under consideration. He should take a lesson from the editor of a classic, to whom conjectural emendation is not permitted until a comparison of all the different manuscripts has shown that there is, as to the particular passage, no real text extant.

¹ American Law Studies, xxxvii. *et seq.*, §§ 823-827, 1002-1011.

² Ibid., §§ 789, 790, 801 *et seq.*

Nearly every reader will impatiently exclaim in reply to what is said above in this section, "Of course, everybody does that which you advise." But it is our conviction that no other duty is more neglected in practice than the one which we are now trying to enforce. Before the magistrates and commissioners, in trials in all the smaller courts, in those in the higher ones — even in arguments in courts of error — you rarely have to wait long without hearing a point properly decided against a counsel upon some relevant constitutional or statutory provision or rule of the general law, which seems when it is cited to have been known to everybody else. "How did it escape him?" the looker on says to himself. The answer is, that a large proportion of both young and old lawyers never bestir themselves over the real questions until after their cases are called on.

§ 143. Having hinted the great influence of the law from the first to the last of litigation; having glanced at the American trinity, that is, State law, Federal law, and general law, and the fact that every legal question arises under one or the other and is to be decided by its peculiar provisions; and having emphasized the duty of always settling a legal proposition by consulting the books for yourself instead of waiting for them to be shown you by your adversary or the court, — we now take up the consideration of the ordinarily occurring legal questions.

§ 144. There are generally three classes of these in cases of the common type. We begin with that one which is logically, and nearly always practically, the first in importance. We may state it in general terms to be, What is the substantive right of my client? We will illustrate. A firm of merchants have delivered goods to a servant for

his master, and the latter refuses to pay for the goods upon the ground that he has not received them and that his servant did not have authority to pledge his credit. If you find that the merchants can prove certain acts of the master noted in the books from which the community may reasonably infer that the servant had the authority in question, it is the same thing in law as if the servant actually had it, although it may be true that the master expressly forbade the servant from making the particular purchase ; and you will recover against the master.

Again, suppose, there being no lineal heirs, that an estate is to be distributed among the collateral heirs, and among the claimants there are children of a deceased brother or sister of the intestate. Under the law of Georgia you would have a good case for these children, for they represent their parent.

In the first of the supposed cases the substantive right of the merchant is to have the fair price of the goods from the master, and in the second it is that of the children mentioned to divide between themselves such a part of the estate as their father or mother would receive if living.

§ 145. We have had you to be counsel for the plaintiffs in the two cases put. We will now place you on the other side of cases which are similar except in a few particulars. We will suppose, in the first case put, that the master has given notice to the merchants that he has withdrawn the authority possessed by the servant, or that some acts have been done by him within the knowledge of the merchants from which acts the law implies a revocation of the authority ; and in the second case, that the children of collateral heirs other than brother and sister are claiming to represent their deceased parent in the distribution of an intes-

tate's estate under the law of Georgia, which provides that there shall be no such representation. In both these you show that the plaintiffs are not entitled in law to the substantive rights which they claim.

§ 146. By contemplation you see that each case in which you are for the defendant has in it a fact of importance, which was not in the corresponding case where we supposed you to be for the plaintiff. These illustrations sufficiently explain to you that every substantive right which a party may claim from another is founded upon the concurrence of certain facts and the non-existence of others. They also show from a new point of view the commanding necessity of the practitioner's beginning the investigation of the case by ascertaining the facts, — at least those material ones conferring or denying a legal right asserted by action.

But the special lesson which we would have these illustrations now teach is, that there are certain rules of law which give the substantive rights pointed out and that a particular rule is to be well studied and thoroughly understood whenever a right is claimed under it. The real test here is, Will the material facts relied upon, well and truly pleaded, prevail against the adversary's demurrer?

§ 147. We have feigned cases where the applicable law is easily found. But to the practitioner it is often a matter of great difficulty to determine with certainty whether a right set up is allowed or not by the law. The relevant legal provisions may be of ambiguous meaning, or there may be none at all. Whether the right or its non-existence be plain or doubtful, it is necessary for the lawyer to have a clear conception of the governing rules of law and to be able to present decisive authority or to give satisfactory

reasons establishing the rules and justifying the application he would make of them. When he can support the right of his client by such citations and arguments as will convince an average judge his preparation upon this part of the case is in a measure complete.

§ 148. After settling that the right of the plaintiff or the defence is maintainable in law, the proper remedy is next to be considered. Often there is but one. But many times there is a choice. Thus in Georgia it is ordinarily better to use the fictitious action of ejectment than the statutory short form, which has no substitute for several demises. The measure of damages may be larger in one action than in another, as for instance the highest value of personal property at any time between its tortious conversion and the trial is recoverable in trover,¹ while the plaintiff's verdict would be smaller if he resorted to an action *ex contractu*, as is often permitted to him. Some cases can be brought in, and others can be removed to, a Federal court, where you can have the benefit of more favorable rules of decision on some subject of general jurisprudence involved than those which prevail in the courts of the State. If you can appeal to equity, you may there find a peculiar procedure helping you and a relief which you cannot have at law.

§ 149. The law is a well-stored armory. No one who begins a suit can ever anticipate precisely what action lying in wait for him somewhere he may provoke. It is not germane to our purpose, in search as we are of only the most general principles, to discuss in detail the whole series of injunctions, cross suits, counter claims, procuring the appointment of a receiver, and other remedies, which

¹ Code of Georgia, § 3077.

often turn a confident attack into a hard-pressed defence, or drive a party into other straits. This belongs rather to the subject of local practice than to the proper treatment of the leading principles of conduct of litigation. We can only say to our readers that, premising for him, as we have, a knowledge of the law of procedure, he must ever be asking himself the question, Can I better myself with a change of forum, or a new remedy, or some other addition to my attack or defence?

§ 150. We will now illustrate the doctrine of the last sections by a series of examples.

I once noted the conduct of an action by the heirs at law of an intestate which involved the actings and doings of the administrator for a long while. It had been brought under the statute upon the bond, without the establishment of a *devastavit* in equity. The items were multifarious; and the fact that the administration was active during the war had added to the complication of the accounts, because of the large displacement of the assets by conversions into Confederate currency, the course of which was not narrated in the annual returns; this currency having been treated as good money by the administrator, as was usually the case in most of the transactions of the time. The plaintiffs made good their claims to ten or twelve thousand dollars, but they recovered a very much smaller amount. It was always clear to me that, had they obtained the appointment of a suitable person as auditor under the local statute, he would have reported for them the full amount to which they were entitled and the defendants would have found it difficult in the extreme to overcome such a report. As it was, the jury could not see their way through the complexity of the proofs, and

they found a verdict which was not so strongly against the weight of the evidence as to command a new trial. The great popularity of some of the administrator's sureties, who were the only solvent defendants, should have suggested to the plaintiffs the good policy of leaving a jury in the case the least discretion possible.

§ 151. Under the Code of Georgia, — which went into operation January 1, 1863, — if the complainant in a bill in equity waives discovery, the answer of the defendant is not evidence for him. Now and then, when you hold a good hand of invincible evidence, it is the better policy to call for discovery, calculating upon the crushing effect of overcoming the answer in case it is adverse. But I have observed that the defendant sometimes prevails because of the omission by the complainant to insert the waiver; and as the courts have established the rule that the waiver cannot be made by amendment after the answer is in, it is great supineness in the defendant to delay its filing and thereby give his adversary opportunity to make the amendment in time.

§ 152. It is often a delicate question whether you shall stand on the defensive or resort to a possible aggressive. Thus you may obtain an injunction of the plaintiff and force him to try the case in equity, where he is turned into a defendant. An instinctive perception of the common feelings must be your guide in deciding the question. I can only say, with much diffidence, that judges and juries generally sympathize with a well-considered and bold assault upon fraud and all intended injuries of a serious kind, while in many cases they prefer to see the possessor merely defend his claim without invasion. To neglect taking the initiative where it will help you, and to assume it when it

appears to be more than the proprieties of your case demand, are both blunders which should be avoided. We will note at another place the usual advantages of holding the initiative.

§ 153. The following will show the use which a cross prosecution may sometimes be made to serve. A, who was a member of a popular and influential family, was pressing hard against B, a man almost unknown in the county, a charge of assault and battery. By the advice of his counsel, B obtained from the grand jury, which had returned an indictment for the charge mentioned, another indictment charging A with shooting at him, — an offence under the local statute much more serious than the other. The shooting and the battery were parts of the same fight, which was without justification on either side. A plea of guilty was promptly entered to the indictment for the lesser offence, and, B's counsel appearing for the State and contending with vigor, A was convicted. The counsel then proposed to A and his friends that it was now their policy to join with him in an application to the court to lighten the punishment of both ; which proposal was perforce accepted. The court, duly considering the weighty representations procured from the grand jury and other persons of standing and reputation by the influence of A's relatives, and also the more potent appeals of the two prosecutors, visited each defendant with the smallest penalty which he could inflict under the law. This was substantial victory for B.

§ 154. Our last example here enforces the importance of rightly choosing your forum when you have a choice.

A suit was brought upon a guardian's bond in the county where the surety resided. The principal, who lived in

another county, was utterly insolvent. On the trial, the plaintiff appeared to have made out his case and to have overcome with his evidence that supporting rather a flimsy defence. But there was a verdict for the defendant, which could not be set aside, as it was held not to be so decidedly counter to the evidence as to require a new trial. The action should have been brought in the county of the guardian, as it could have been under the local law. The plaintiff would then have had the surety away from home and where his popularity in the vicinage could do him no good, and where too he would have been burdened with the odium of the faithless guardian. Besides, in that county the guardian, who was the main witness for the defence, would have testified from the stand. As it was, his testimony had been taken by commission, which the statute authorized in the case of those not residing in the county of the suit. A rigid cross-examination *viva voce* would have destroyed the credit of the witness. But the law of the State permitted only a list of set cross-interrogatories to be addressed to those who testified before a commission. The plaintiff threw away two great advantages by suing in the wrong county, and thus lost the verdict which he would otherwise have probably won. When the surety's hand was disclosed by the service of his interrogatories on the plaintiff, the action should have been dismissed and another brought in the county of the guardian.

We hint that there are many considerations other than those mentioned above which guide you to the selection of your forum. The leaning of a judge in cases of special character, or his known convictions as to certain legal questions; the advantage of having your timid and shaky

witnesses examined by commission and of having your others who will bear themselves well under oral examination to testify from the stand, and the further advantage of dispensing with the presence of the more effective of the adversary's witnesses or of forcing into court those whom you can demolish or turn into allies by a cross-examination; avoiding or making use of the prejudices of the community or of its familiarity with the transaction in question; — these are not all the reasons for preferring a particular court which practice will teach you after a while.

§ 155. As we close this division we sum up briefly, and say to our student, that, after he has satisfied himself that the right asserted, or the defence set up by his client, is maintainable in law upon the probable facts, he should take the remedy which combines all or as many as may be of the following qualities : —

1. It should stand against demurrer or legal objection of every kind.
2. It should make available all of the client's material points.
3. It should be so managed as not to contribute any help to the other side.

These three may be termed the strictly legal essentials.

4. The remedy must also, as far as it can be made to do it, include all of what we may call the non-legal resources of the case; such as the most favorable forum and vicinity, the alliance of influential parties, and many other particulars which will suggest themselves to the trained practitioner wherever they exist.

All of good according to the foregoing enumeration which is certain or achievable must be considered, and

then the practitioner must follow the maxim, "Prout ergo expedit, ita quisque vel hanc actionem vel illam eligere debet." ¹

§ 156. The substantive right demanded, or its denial by him of whom the demand is made, is to be first attended to; then the remedy; and next comes, as the last and third division of the more prominent essentials of legal preparation, the competency of the expected evidence. Of course, where it is voluminous the whole cannot be anticipated, and therefore there cannot be anticipated all of the legal questions which may arise upon it. But you will know that on which you rely to make out a *prima facie* support of your main points, and also much that will be produced against them. The important details of arranging the proofs so that they will sustain your pleadings and impugn those of the adversary, do not concern us here. It is only proper to treat legal points. You should carefully guard yourself against relying upon a proof which can be shown to be incompetent, and also stand prepared promptly to challenge every illegal one of the other side that you cannot disarm or turn into a reinforcement; and divining as well as you can the objections which may be urged to your testimony and those which it will be your interest to make, you should be furnished with the right authorities and arguments.

The duty mentioned in this section, though it is palpable to even the younger bar, is too much neglected by tried and experienced practitioners. From constant use in all sorts of business and upon every side of the court, we assimilate the general principles of evidence so thoroughly

¹ Inst. 4. 7. 5: "The action which is the more advantageous should always be chosen."

that we fancy we can satisfactorily handle any question under this branch of the law at a moment's notice. This often leads us to build upon an inadmissible proof, to overlook such of the adversary, and to make unmaintainable objections. The counsel should frequently turn over the proofs in his mind — both his own and those which he has reason to think will be offered on the other side — in order to foresee clearly what need he may have for the rules of evidence in defending his positions or assailing the opposite.

§ 157. We have thus run over the entire course of legal preparation. There remain, however, some general reflections to be made which belong alike to all the three divisions which we have marked off.

We begin with the three kinds of law which the lawyer encounters at every stage.

The first is that which is certainly against or counter to him.

The second is that upon which he may take position with unerring certainty. It may be the unmistakable command of an enactment or an harmonious current of decisions and authorities.

And the third kind is a considerable domain, lessening slowly in size every year, but which will never wholly disappear; and that is where the law is really doubtful.

§ 158. No prudent lawyer will throw himself against law of the first kind. He will avoid it and steer around it. And of course he will throw away no advantages under the second kind. Law of the third kind occurs less frequently than either of the other two, but it does meet the practitioner so often that he should be educated in the proper modes of dealing with it.

The minds of men are so different that as a consequence we have jar and conflict in opinions of the profession and in judicial decisions. A judge sometimes reverses himself. The rulings of previous courts are now and then overset by those of their successors. There are many uncertainties inherent in the law. Language, either in enactments or from the mouths of judges, is obscure or of double meaning. The subject may be new, and we see that it must be left to the future for further development. Some particular doctrine assumed by courts and text-writers, and which is beyond the sure application of *stare decisis*, appears to be so unreasonable that we may expect its modification when sharply questioned. Upon all doubtful law which is relevant to the case the counsel should take chances with judgment. He should give his client opportunity of winning. But he must avoid risking too much on uncertainty. If he can, he should have — to use a colloquialism — another string to his bow.

§ 159. As a continuation of the last section we must note the cases which are without precedent. We need not repeat what we have said elsewhere upon the appeal that must sometimes be made to principle.¹ But we must remind the student that he will find judges extremely averse to making *avowedly* new rulings. He must bear in mind that this almost humorous description of Sir H. Maine is but the truth :—

“ With respect to that great portion of our legal system which is enshrined in cases and recorded in law reports, we habitually employ a double language, and entertain as it would appear a double and inconsistent set of ideas. When a group of facts comes before an English court for

¹ American Law Studies, §§ 801–809.

adjudication, the whole course of the discussion between the judge and the advocate assumes that no question is or can be raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that if such a rule be not discovered it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision *has* modified the law." ¹

§ 160. You must not, therefore, if you can avoid it, shock the sensitive conservatism of a judge by asking for an innovation as such. It should if possible be demanded as an old principle. Such a demand is generally permissible, as even the latest doctrines and measures are to be justified by long-obtaining maxims of expediency and right. But sometimes all pretence must perforce be thrown aside, for the novelty of your position is too conspicuous for concealment. Here the lawyer, if he would succeed, must be able to show that a great interest is at stake, and come before the court fully furnished with resistless demonstration. He must have besides an infallible presentiment that the judicial mind, prepared by previous reflection or discussion and the calls of the community, is ready to advance courageously, before he can safely rest his case upon the chance of such a decision as he now seeks. Let him have other and more certain positions if he can.

¹ Ancient Law, 81 (London, 1870).

§ 161. The born lawyer exhibits in his preparation a growing tendency to found his aggressive or defensive combinations the more circumspectly on sound legal ground. The wary veteran of forensic battles is all the while suspicious that his assumptions will be shown to contravene governing authority, and this suspicion keeps him from sleeping in a false security. His avoidance of bad law becomes instinctive. And he shows another growing tendency. He is too busy for much laborious thought. He is a man of action. Often he cannot give legal questions in his case a thorough examination before he must prepare to argue them in the court of last resort. This constraint begets in him a wonderful facility of turning his cases around struggles upon uncertain law questions. He never engages with his adversary for the mere love of controversy. He must first see either that controversy is inevitable, or that he can anticipate with much probability some justifying advantage. Legal questions, though easy when argued for us by able lawyers, learned judges, and gifted text-writers, are not always easy to decide before such argument. The really easy questions are not seriously mooted. When good lawyers divide on law points and resolve to argue them in earnest, there is generally difficulty. The sifting and analysis necessary to detect the cardinal propositions is often an Herculean labor. The wary practitioner fearing gins and snares, will, if he can do it with safety, at once shun a question which he has not time to settle, and press his adversary upon ground better known.

§ 162. In the selection of the points upon which he is to stand or fall, he must use good sense and judgment. As he becomes older he refrains more and more from what may be termed over-refining. The law is not of the family

of the exact sciences. It has a favorite maxim, that it cares not for small things. The plain men in the jury-box are struck with prominences and appreciable superiorities in the evidence. They measure roughly and seek not to be finically precise. The judge is also practical. His knowledge of the law is in some sort scientific; but his peculiar science teaches him that he must not be over-logical and he must not regard infinitesimals and exactitudes. He will often decide right and be as unable to give a good reason as a woman is for *her* right decision. He gives correct judgments, not "laboriously, but luckily."

§ 163. We have thus outlined nearly the whole tract of legal preparation. Many disputes will arise collaterally during the trial or hearing, without warning, and which therefore cannot be prepared for. To manage these rightly you must needs rely upon your mastery of common principles and the training of experience in analysis, decision, and argument; and especially upon your familiarity with the facts and the needs of your case. The legitimate objects are what you can anticipate,—the maintenance of your case as pleaded, the support or attack of the remedy and also of the expected evidence. The authorities settling these different points are to be collated and considered well.

The duty just noted is much slighted. You will see every day that even lawyers of fair standing lose cases which are counter to the State statutes and decisions, to say nothing of those where they blunder as to the general or Federal law. You will also find that many where they win have overlooked the really decisive authority. A better preparation would have avoided contesting untenable ground or diminished the peril to a good cause.

§ 164. The vital points which you may reasonably expect to be controverted are your especial care. As to these you are to be as impregnable in defence or resistless in attack as possible. Nearly all of these — I should say seventy-five per cent of them at least — are easy, requiring only a little attention bestowed in due time. The remaining ones give trouble. Here you must avoid self-deception. Do not impose upon yourself with over-logical views. You will generally be profited by conference with your brethren. They may not cite a relevant authority or advance a decisive reason, but they will in their concurrence indicate an instinct or tendency of the professional mind that is the staple out of which legal doctrine largely comes. Even a hasty opinion of the average bar — not that of one lawyer — is entitled to respect. If it does not point the way to the truth, it may disclose a difficulty which when forewarned you can remove. But when the bar differ there is usually difficulty, and here you can hardly ever be more than falsely confident.

§ 165. We leave this part of the subject by saying that the general aim of legal preparation is that you may be safe on the turning-points as to the right claimed, the remedy and evidence, and be able to get the approval of the court.

§ 166. The pleadings do not require the attention that they once did. They become less and less artificial in England and all over America. It must however be remembered that, while the privilege of amendment saves nearly all bad pleading, the addition of material allegations by the exercise of the privilege will generally surprise the adversary, and he must be allowed sufficient time to meet the new matter. You will then hardly ever be able to

bring him to try before the next term. It is often of the utmost consequence to coerce a trial ; and the insufficiency of your declaration or plea may lose a golden opportunity. Let your pleadings be neat, brief, lucid, and of adequate fulness, making such a case that you will not be driven into an amendment or be deprived of a triumph by an arrest of judgment.

In cases out of the usual line of precedents they sometimes require great care. You should remember that to plead a difficult cause well is often to win it, communicating a mastery, as it does, which is to be had in no other way. Occasionally you must plead ingeniously and delicately in order to cover a weak point by a show either of unconcern or of great strength. There are ruses of vagueness, double meaning, and sham, of which we see wary practitioners now and then make good use. And try to foresee the amendments of your adversary, so that when they are made you will have no need to ask for delay.

§ 167. There are demurrers which are of only dilatory effect, and they may help you when it is your interest to balk a hotly pushing antagonist. There are others which rout and destroy ; as, for instance, when your client is indicted under a statute which you can show to be unconstitutional. Your own wit will instruct you how to avail yourself of both kinds, and prepare them properly.

CHAPTER IV.

OTHER PARTICULARS OF PREPARATION.

§ 168. WE do not devote a separate chapter to what in our Introduction we classed as the third element of litigation and developed at considerable length.¹ Law and fact are generally the staple of the case, while the other element is uncertain in occurrence and quantity, and when it is present with much influence it is for the most part as an addition of coloring and weight. The more common examples of the emotional excitement to which the lawyer must attend in his preparation are friendly and hostile prejudices. The favor which the locality will generally show a resident, and the opposition that people living at a distance who contend with him will call forth; the popularity of women, and the unpopularity of railway and insurance companies; the attitude of different races, political parties, religious denominations, secret societies, and many divisions of the community which we have not space to mention, towards their own members and those of the others; the hearty unquestioning acceptance by the multitude of certain views and notions upon common subjects, and their gushing approval or disapproval of particular acts; — these are instances. It is to be noted that wherever the family relations are in any wise involved,

¹ *Ante*, §§ 14-19.

jurors generally and judges often can look through only a medium of inveterate sentiment. It needs not to go beyond this and try the vain task of exhausting the causes which set passion or feeling in active play. But we must suggest that the lawyer has to anticipate in every case the effect which the revelation of his facts will work on the likes and dislikes of the judge and jury. To be a prophet here postulates a good natural gift of discernment into the heart of man and much professional experience. We observe that many of the bar calculate that every issue of law or fact will be weighed always in cold blood, while a still greater number often make false appeals to feeling with their evidence and speech. The consummate lawyer rarely falls into an error of omission or commission in this matter, either in his preparation or during the trial.

§ 169. It is a peculiarity of modern development that the advocate, whether popular, parliamentary, or forensic, does not aim as consciously to stir the passions as was the wont in the olden time. This is the only material respect in which the orations of Cicero would be out of place in our courts. When the speaker discloses by his action that he has premeditated pathos or invective, or that he has executed a stratagem to excite favor or hostility, and he feels that his cause depends upon the use of such means, we are repelled at once. The moderns strive more earnestly than did the men of the classical days to subordinate the feelings to the judgment. Of course we can never accomplish this to the full, but we have attained the point where we but seldom consciously give the feelings the lead. They are to be evoked without apparent design, or, what is still more efficacious, as dictates of the judgment. To the great mass of mankind their prejudices and emotional

impulses seem to be their convictions. When the lawyer would break their force he must make them show their real nature, but he is to keep it back when he would have in them reliable allies.

§ 170. Many times the temper and leaning of the community are so decided that the fact must be recognized in preparation. A woman was litigating with the executor of her deceased husband upon a large claim to which there were clearly two sides on the facts. She and her husband had each several adult children by a former marriage, but there had been no fruit of their own. The children of the husband lived in a distant part of the State, while the widow with her children had long lived in the county of the forum. While she was alive her case was exceedingly popular, and the counsel for the executor had avoided a trial. She was old, and had for years been in feeble health. She died, and, presto! the case changed sides. Her children, though residents, as against his non-resident children somehow could not hold the place of their mother, and they were regarded as strangers. The widow of the deceased could demand his bounty, while her children could not. It was really no question of bounty, but the impulses of the people made it such. And thus in the case one natural bias had displaced another. Of course as regards preparation the plaintiff's lawyer would be in haste to complete his readiness for trial and to try before the death of his client if possible, while the adversary would find cause for waiting if he could.

§ 171. We give another example. The statute of limitations has lost almost all of its former odium as a defence. And courts become more prone to disallow old claims even when they are not barred by the statute. A

purchaser of the reversioner's estate had brought ejectment against a lessee just after the expiration of the term of twenty years. There was some show by the defendant that the alleged lease had never been made and much more of outstanding title. The plaintiff proved that the written lease he alleged had been lost, and his evidence of the contents and of his title was superior to that of the defendant. But he lost the verdict by failing to impress upon the jury that he could not sue earlier than he did because of the lease. As he made his only effort against the outstanding title set up, the jury, not being enlightened on the other point, felt that the plaintiff had slumbered over his rights long enough to forfeit them. Now do not exclaim, What a stupid jury! They were intelligent and honest laymen, though not good lawyers. They did know that it was the law of the State that twenty years' possession gave a title by prescription, and the mistake they made was a natural one for laymen to make. The plaintiff got the verdict set aside, and when he tried again his counsel, who had learned the reason of his miscarriage, took pains to explain why the suit could not have been brought within twenty years after the commencement of the lease, and achieved a final victory.

And we remind you that you should always seek to have some evidence giving a good reason why your claim, if it is an old one, was allowed to become so before the suit was begun.

§ 172. The forum of your choice, the golden moment of favor when to try, connection with parties or a cause that are stronger than yours, admissible proof that commends your side to the good and the other to the bad will of ordinary men,—these and similar advantages are to be looked

for with wide-open eyes and clutched with unslipping hold when found. And you are to be on the watch against the enemy. Build in time a protection against the odium he would throw on you, and never overlook an opportunity of curtailing his emotional resources.

§ 173. Our next concern here is to glance at some of the items of preparation which do not properly belong to any one of what we have termed the three elements of litigation. We need give only a few hints, to be filled out by the student from recent books of practice, the study of judicial records,¹ and his experience.

§ 174. Your declaration, bill, plea, or answer must be filed in time. Where any of your papers require service you must be careful to have the proper officer comply with the requisites of the local statutes or rules of court. Often you should give certain notices to the other side; otherwise the case will not be ready for trial when it is called on.

§ 175. Agreements of counsel play a *rôle* of importance in practice. Thus, an admission that both parties derive title from the same person may save much expense and trouble to the plaintiff in an action involving ownership of land. And there are many facts not really disputed, but which must be proved in order to make out your case. Your adversary will usually be willing to admit their existence. Many of your brethren will be prompt to make all such concessions as help you and do not hurt them. It was once my great pleasure frequently to have as the leader of the other side a consummate lawyer who never insisted upon anything immaterial. To all of my requests for the consents here suggested he habitually replied, "I always waive everything but my client's money."

¹ See American Law Studies, §§ 990-992.

You will find it well to solicit these indulgences as soon as you discover the need of them, for it is much more probable that they will be granted then than if they be applied for on the eve of a trial. And it is the better policy to have them evidenced by writing. That Professor Washburn never had a parol understanding with his brethren denied in a thirty years' practice,¹ is exceptional. A very large proportion of the bar can be trusted without limit in this respect, but there are some who cannot be. There are other reasons for the course which we advise. For instance, a written agreement having been acted upon, it will generally be enforced by the courts against counsel who succeed those who made it in the conduct of the case.

§ 176. Sometimes a position taken by the adversary requires you to do something in order to meet it. Thus, the plea may truthfully allege that certain property is yet encumbered in a particular way, when it was sold by the plaintiff as unencumbered and such sale was the consideration of the contract upon which suit has been brought. Here of course you will see to it that your client removes the encumbrance before the trial, if he must and can.

We have not space for further remark as to the subject of this section. We leave it by saying that, if you keep your eyes about you in practice, you will note many other illustrations of things which the adversary will force you to do if you would not forego the judgment sought in your pleadings.

§ 177. We devote the rest of the chapter to some general reflections pertinent to all the branches of preparation.

In the first place let us note as a fault too common with

¹ Study and Practice of the Law, 106.

eminent counsel that they leave the investigation of the case and the classification of its details to inferior workmen. Many assume no part of the management before trial. They seem by their behavior anxious to inculcate the belief that their great abilities are for the courtroom alone ; that the whole important conduct is there ; and that there is as little precedent preparation of a case necessary as of a game of chess. And the people at large still believe that all this is true. They seek a strong speaker to argue their causes. They care little for the talents or training of the humble junior on whom they shall devolve the ceremony of introducing their champion into the lists, esteeming as they do preparation to be the easy accomplishment of average ability. Now we have striven and written in vain for our student, if we have not convinced him that the great need of the highest talents of the lawyer is in shaping the conduct of the case before trial. Can the topography of a field be learned as well after the battle begins, as it can be in days of exclusive attention beforehand ? And can a lawyer who has never looked into an intricate affair, when the night before the trial has come, master the pleadings, the long array of documents, and the other proofs, and make the analysis of the whole necessary for its proper management, as well as if he had taken months to do all these things, with no disturbing pressure upon him ? Our young lawyers will do right to master thoroughly the duties of English attorneys and junior counsel. The former make a full statement of the facts gathered from the client, interviews with his witnesses, and inspection of pertinent documents, which statement is submitted to a junior, who gives a written opinion upon it. If the answer of the counsel is in favor of liti-

gation, there may be a further sifting and accumulation of facts, and after a while an opinion on the evidence is taken by the attorney. Every step as it were is in careful writing and under the eye of an attentive counsel. Finally, on the eve of the trial, the brief made up by the attorney, to any intelligent lawyer, tells all of the case of the client and anticipates much of the adversary's. The evidence is marshalled and all the details co-ordinated, the issues presented and the line of conduct indicated. I am convinced that our system in America, uniting as it does attorney and counsel in one, is, in the hands of thoroughly trained lawyers, the better. Its faults, which are mainly due to defects of professional education, are not inherent, while it has a great inherent superiority to the English. Under the latter, the counsel is never brought in contact with the witnesses until he faces them on the stand. To use a metaphor from the military, the general never reconnoitres in person. We subjoin the comment of our celebrated lawyer, David Paul Brown.

§ 178. "Both of these systems [the Roman and the English] were undoubtedly less onerous and more agreeable than ours, but neither of them was as beneficial or so economical as that which is almost invariably adopted in the American courts, and especially in Philadelphia. Here the attorney is the counsel and the counsel the attorney; he manages and controls the entire progress of the suit; his intercourse with his client is not intermediate but direct; he conducts all the pleadings, prepares his own brief, examines the witnesses in his office or in court, digests and arranges his own authorities, and finally argues the case. The labor incident to these duties is very great, but its advantages are commensurate. A man can never perform

any work so satisfactorily as when he is acting upon his own knowledge, nor can facts procured by an attorney be as satisfactory to counsel as those which he himself might obtain by personal examination. Every man has his own views in regard to the points of a case and the nature of the evidence required to elicit them, and he can therefore 'best minister to himself.' This course secures counsel against confusion and surprise; it furnishes him with a knowledge of the weakness as well as the strength of his case and that of his adversary; it brings him into timely contact with his witnesses, he becomes acquainted with their manner, their temper, their bias; all of which enter largely into the estimate of their testimony. It has been suggested that this would be impracticable in England. It might be inexpedient to make any radical change in their deeply rooted system, but it certainly would not be impracticable, nor perhaps injudicious. It is true we cannot argue against a system merely because it is subject in some respects to casualties or exceptions, but those who have attended legal proceedings at Westminster Hall or Lincoln's Inn could not fail to have perceived, and not unfrequently, great embarrassment of the counsel from a want of that familiarity with the facts and their application to the legal points of a case which would have been avoided or lessened by pursuing the system adopted in this country. No lawyer can examine a witness satisfactorily from the notes or brief prepared by any other hand than his own; he is often rather benighted than enlightened. And of all briefs, the brief of an attorney would be the most objectionable or least available. They save time to counsel, but they place him in a state of dependence from which it in some cases happens no genius or talent can relieve

him. A man who always depends upon another naturally and necessarily impairs his own powers.

§ 179. "We remember a rather amusing instance of this in the argument of an injunction in the case of *The Queen v. Strange*, before Sir Knight Bruce, in 1848. The attorney or solicitor having of course prepared [the brief of?] the pleadings, which were voluminous, bill, answer, etc., the learned judge during the argument inquired of Mr. Talfourd as to the averment of a certain fact which was deemed vital to the proceeding. The learned Sergeant (who had probably never read anything more than an abstract of the bill) could not find it, — none of the attorneys could find it. The Crown affirmed its existence, the defendant denied it, and after an hour's confusion it turned out that, although contained in the original bill, it had been omitted from the transcript."¹

§ 180. The advantage of collecting and inspecting the evidence for one's self, and of keeping up with the preparation at every stage, can hardly be overrated. Without this the wariest lawyer will often commit pernicious blunders both of omission and commission. Especially should the leader, or his most reliable associate, always talk with the party and witnesses in cases where the facts are seriously contested. Mr. Parker narrates the following, which will enforce our counsels : —

§ 181. "He [one Captain Ashton] claimed to have loaned several thousand dollars to a trader upon a mortgage of his stock. The trader failed, and his creditors contested the mortgage. They urged that the captain had no visible means, no property, and could not have had the money to lend on mortgage ; and, moreover, that the

¹ 2 Forum, 255 *et seq.*

trader's stock of goods was so small and his assets so deficient that he could not have had the money.

"Captain Ashton contended that his money came to him from England in sovereigns, and that he lent this gold to the trader.

"It looked rather dubious for Ashton.

"Mr. Choate prepared to try the case for the plaintiff, Ashton. It was to come on at Lowell.

"The plaintiff's witnesses were summoned to meet Mr. Choate in a room of the hotel. Ashton had not met his debtor for some time. Ashton and his counsel, with witnesses, were in the private room when the mortgagor, who had been notified to appear, came in. Ashton sprang at him like a tiger. 'You scoundrel,' said he, 'you have cheated me; you have robbed me of my gold.'

"Mr. Choate remarked to the writer, years afterwards, in speaking of this case, 'That incident satisfied me my client was right. I knew it and felt it, and knew that was the case for me. I care not how hard the case is, — it may bristle with difficulties, — if I feel that I am on the right side, that cause I win.'

"Mr. Choate got a verdict, but it was set aside for some cause; and before the second trial Ashton had disappeared. But sufficient facts were subsequently developed to leave no doubt that Ashton's story was true."¹

§ 182. Now had Mr. Choate been an English counsel engaged in this case in England, he would not have entered the trial encouraged by having witnessed this impressive spectacle. Some attorney might have seen it and tried to narrate it to the counsel, but he could not have fully represented the expression and the action of Ashton.

¹ *Reminiscences*, 115.

§ 183. In advising the attorney who is getting up a case to sift the witnesses well, Sir George Stephen admits that English counsel are unskilful, in the following passage:—

“I have dwelt at considerable length on the examination of the evidence because it is the most important of all duties that fall to the lot of the attorney, and it is the only one in which he can derive no assistance from the superior information of counsel; indeed, I have generally found counsel more unskilful in the *private* examination of witnesses than ourselves,”¹—that is, than attorneys.

This inferiority of English counsel is due to their little practice in such private examination. The defect should be carefully avoided by the American lawyer. To be able to elicit from dull or reluctant people all that they know of benefit to the client, is a most valuable quality. And it is one which a counsel by reason of his superior legal knowledge and training can develop to a much higher degree of efficiency than can be attained by an attorney.

§ 184. There is a natural consolidation as well as a natural division of labor, and so there is simplification going on in the world as well as multiplication. The division of labor between the English attorneys and counsel is as if the master never took his scholar in hand until the moment of final examination, having turned over his training to an ignorant assistant. A delicate trust, requiring skill and tact for its performance, if delegated by the trustee, should be delegated only to an agent possessing requisite ability. What would be thought of an ancient historian—a Niebuhr or a Mommsen—who took the facts from which he drew his conclusions entirely from modern compilations?

¹ *Adventures of an Attorney*, etc., 306 (New York, 1874).

How far short of his able and exhaustive treatment would Mr. Bishop come if he never consulted the reports and authorities for himself, but got them at second hand from the notes of clerks and copyists! If we found such a system of writing history or law-books we should pronounce the division of labor in it to be unnatural and pernicious. And it seems to me that the English system, dividing as it does the preparation of cases between attorney and counsel, and not permitting the latter to sound the witnesses and party for himself, is so far a false system. I believe, if the duties were interchanged, if the superior man were to play the attorney, sift the witnesses, marshal the proofs, and leave to the less learned and able attorney the drafting of the pleadings and the conduct at the trial, that in the final issue of litigation those parties who had the better causes would in the average fare better than they do now. The disease of the system is that it assigns the feebler and more unskilled man to the post which requires the greater strength and skill, and it artificially divides that which in its nature is indivisible and integral.

§ 185. Our young lawyers of America should aspire to make both good attorneys and good counsel. They will be the better counsel for having become good attorneys. When they have risen to leadership and much of the burden of preparation must be devolved on their partners and associates, they will rightly guide and direct the latter, and also know when their personal attention to the facts and details of cases is necessary and how to render it properly.

§ 186. There are many cases of multifarious and complicated details, or of doubt and difficulty as to the law, where it is advisable for the client to have more than one

counsel. Occasionally we see a single lawyer get up an important and laborious case well, and conduct it faultlessly from beginning to end. But ordinarily one in good practice is so subject to interruptions of many kinds that, though ever so careful and painstaking, he is not willing to undertake the entire management and preparation of a seriously litigated case. The old adage, that two heads are better than one, is applicable. Labor merely manual or clerical needs not much looking after if the laborer is honest. But where there must be thought and reflection at every step, the wisest and most capable man should increase his own ability with assistance. You have seen the bystander point out the best move in the game, which had been overlooked by the player. Possibly there have been many good moves which he did not anticipate; and yet as to the particular move mentioned he has had better insight than the player. I inquired the character as a lawyer of a new-made judge of one of the shrewdest and quickest members of the bar. "O," he replied, "he is a splendid fellow to sit by you during a trial and give you suggestions." There is hardly any lawyer who will not, when he is preparing or trying a case alone, sometimes commit a blunder which will chagrin him, because it is so palpable after it is committed. The blunder will be seldom permitted by an attentive associate of even humble capacity. The ablest lawyer will generally be the busiest; and he will therefore, in his moments of fatigue and exhaustion, or when he is too pressed with a multiplicity of engagements to look into any one thing with sufficient care, need the calm vision of an unruffled associate.

§ 187. The burden of preparation should be fairly divided between associates. Each one of them should

be chosen for his peculiar ability, and then be made to exert it. The following passage from the *Life of Burr* is illustrative : —

“He [Burr] showed unequalled tact in placing his men. Before selecting his associates in a cause, he would ascertain and carefully calculate all the opposing influences, — prejudices, interest, indifference, ignorance, political, local, and family feeling, — and choose the man likeliest to combat them with effect. If there was a *crank* in the mind of the judge he would find the hand that could turn it to his advantage. If there was a prejudice in the mind of a juror he would contrive by some means to bring it to bear in favor of his client. If learning and eloquence were essential he would enlist their aid also.”¹

§ 188. This excerpt from Lord Bacon is of application here : —

“There be three parts of business, the preparation, the debate or examination, and the perfection. Whereof if you look for despatch, let the middle only be the work of many, and the first and last the work of few.”²

We may make “preparation” stand for the analysis of the case and enucleation of the issues, which of course must precede the assignment of their parts to the different associates. The “debate or examination” includes the varied labor of the associates. And the “perfection” is that which we shall soon explain to be the Plan of Conduct and also the command exercised by the leader throughout the trial.

§ 189. There should be frequent consultations of all the counsel. Every one of them should at any moment know not only what has been done by the others, but also what

¹ Parton, *Life of Burr*, 150.

² Essay, Of Despatch.

each is then doing and is to do. This unity will secure from every one his utmost achievement. Thereby faults will be corrected, blunders avoided, and surprises anticipated. And the client should not be permitted to encumber the case with useless counsel. He should be made to understand that according to the proverb, what is everybody's business is nobody's, he is but inviting failure when he has a throng of counsel and it is not known which one should lead and who should be answerable for the several items of preparation. There should be a leader, chosen either by the client or designated by his superior standing. As a general rule the associates should be selected under his advice. His experience and knowledge will dictate to him the kind and number. After they are selected and placed, there should be between all the extreme of freedom and unreserve as to the secrets of the case. Every contribution that any one of them can make to the cause should be made without stint. Nursing a darling point in reticence and keeping it from his companions to make a surprising and brilliant display of it in court, is unworthy of a lawyer. Rather when the preparation has been difficult and laborious and a faultless conduct has won a great victory, let it be impossible to discover who did any particular part of the perfect work. And bickerings and manifestations of jealousy between associates are dishonoring to the profession.

§ 190. A new counsel, employed after the preparation has commenced, should be furnished by the others with their knowledge and views of the evidence and their legal positions and citations. He can thus begin his investigation where they have left off, which will save time and profitless labor to the case.

§ 191. Treat your associate always with respect. Hear his suggestions with attention. Though he is as far from you as night is from day, manifest no impatience. If you disagree, avoid all heat. A calm and placid statement of a different view when you are in the right will nearly always be convincing. And if you keep cool and your adviser states his opinion without excitement, you will yield in case the opinion appears to be correct. Truth presented without excitement to a mind not passionate is generally accepted as soon as understood.

§ 192. Local counsel, as Americans are in the habit of terming lawyers who reside in the community where the case is to be tried, are nearly always indispensable. The movements of the adversary and the opposing influences at work can be properly watched only by counsel on the spot, and most of the preparation must be there made. The sway of local counsel is also to be taken into the account. The popularity of lawyers and their troops of numerous friends are often formidable allies to the client. The personal influence of a particular lawyer is sometimes of itself worth a large fee.

§ 193. The foregoing as to plurality of counsel is intended to be suggestive rather than exhaustive. The principles determining their proper selection are well understood by the profession, although they are too often disregarded. We leave the subject with the remark, that we have more often seen too many counsel than too few associated.

§ 194. That the practitioner should always have a definite purpose is a truism, but it is so surpassingly important that we must say something special of it. The sixth of David Paul Brown's Golden Rules for the Examination of Witnesses is, "Never ask a question without an object, nor

without being able to connect that object with the case if objected to as irrelative." It is the Golden Rule of preparation that everything from beginning to end be done with intelligent purpose. Action solely for the sake of action, as a woman often insists upon dosing a sick patient with the first medicine that comes to hand merely because something must be done, is sheer foolishness. It is not enough that everything be done with an object: it should be done in accordance with the well-understood purpose of right preparation. The lawyer, whether he is leading counsel or not, should have a clear perception of the end to be attained before he begins to act. If not, he will disarrange the unity of his preparation and be often detected and exposed by a skilful adversary as warring against his own side.

§ 195. But this is not advice to stand forever shivering on the brink. Goethe says, "Who meditates long does not always choose the best"; and again, "Many deliberations usually show that one has not his proper object before his eyes, while overhasty actions show that he does not know what it is." A lawyer must decide, and having decided he must act promptly and keep acting vigorously. He is not the hesitating Hamlet, who stops to probe and sound every proposed measure to its infinite depths. He cannot even meditate long over his law-books. He must be as quick as Kenyon, of whom Lord Campbell tells us: "Dunning, instead of continuing to dine on cowheel, shortly after being called to the bar was making thousands a year and had obtained a seat in Parliament. He had many more briefs than he could read and many more cases than he could answer. Kenyon became his *fag*, or in legal language his 'devil,' and then began the career which

led to the chief justiceship. With most wonderful celerity he picked out the important facts and points of law which lay buried in immense masses of papers, and enabled the popular leader to conduct a case almost without trouble as well as if he had been studying it for days together."

§ 196. His quickness introduced Kenyon to Lord Thurlow. The same biographer says : —

"But his fortune was made by the elevation of Thurlow to the woolsack. This man of extraordinary capacity and extraordinary idleness when called to sit in the Court of Chancery, earnestly desired to decide properly and even coveted the reputation of a great judge, but would by no means submit to the drudgery necessary for gaining his object, and as soon as he threw off his great wig he mixed in society or read a magazine. To look into the authorities cited before him in argument and to prepare notes for his judgments, Hargrave, the learned editor of Coke upon Littleton was employed, but he was so slow and dilatory that the lion in a rage was sometimes inclined to devour his jackal. Kenyon, sitting in court, with a very moderate share of practice, having once or twice as *amicus curie* very opportunely referred him to a statute or a decision, was called in to assist him in private; and now the delighted Chancellor had in his service the quickest instead of the most languid of journeymen."

§ 197. This faculty of rapid and accurate work is indispensable to the efficient lawyer. For all the wonderful correctness of his judgments, Lord Eldon's fame would now be greater had he been less slow to decide and act. Mr. Smiles, in his *Self-Help*, thus illustrates our present theme : —

“Sir Walter Scott, writing to a youth who had obtained a situation and asked for his advice, gave him in reply this sound counsel, ‘Beware of stumbling over a propensity which easily besets you from not having your time fully employed. I mean what the women call *dawdling*. Your motto must be, *Hoc age*. Do instantly whatever is to be done.’”

§ 198. Of course there should be the indispensable precedent forethought; and rapid as his action must be, the lawyer must feel when it is finished that it has been done with full consideration. The words of Burr, who was as prompt to decide as he was indefatigable in execution, are wisdom. We transcribe from Mr. Parton's Life. “There is a maxim,” said he, “Never put off till to-morrow what you can do to-day. This is a maxim for sluggards. A better reading of it is, *Never do to-day what you can as well do to-morrow*, because something may occur to make you regret your premature action.” David Paul Brown did injustice to this counsel of Burr.¹ To harmonize its teaching with that of the sayings of Goethe and Scott just quoted, is to formulate the essential principle of a busy man's life. Action must be prompt, but it must be well weighed; it must be as prompt as it can be to be well weighed, and as well weighed as is compatible with its being prompt.

§ 199. This necessary accurate forethought and promptness can only be had by the preservation of composure. Here are wise words of David Paul Brown:—

“By all means in all circumstances maintain your composure; if you lose that, you lose all. If asked what is the most desirable attainment of a lawyer, we should say

¹ Forum, II. 69.

composure. A wealthy and venerable gentleman of this city, whose only son had recently been admitted to practice, called upon us and with a perfectly natural interest in the future advancement of his son inquired what course we would recommend in order to his success at the bar. 'Your son,' was the reply, 'has had an excellent education in literature and in law. All that he will require in order to render his faculties and learning available is composure.' 'Ay,' said the anxious parent, 'but how is that to be acquired?' 'That,' we replied, 'must depend upon himself and upon time and circumstances. He must learn it as Peter the Great learned to conquer, by being flogged and defeated over and over again, deriving instruction from every overthrow. In short, he must let no man be master of his temper but himself.' "

§ 200. Flurry from thinking too much of your adversary's weapons and too little of your own, or from the short time allowed for getting ready, or from the self-accusation of neglected opportunities, often balks preparation. And if you will note some lawyers at work in their chambers they are always imagining the trial, devising brilliant cross-examinations in detail for adverse witnesses whose real testimony they have not taken proper pains to discover, and making showy speeches to points of law and fact which will never arise. They heat themselves and become oratorical too soon ever to learn the all-important particulars of the case which supply winning arguments and appeals. This poisons all their labors. They almost remind one of children talking to themselves while building air-castles in the future. A trial anticipated in this spirit will most generally prove, when it comes, to be an air-castle. In the preparation of his cases the lawyer

ought to avoid all passion and resolutely turn away from the visionary. A judge impartial, or a jury not partaking at all of his client's passion or his own, are to be convinced that his case is good.

§ 201. Patient and never remitted attention is a potent virtue. Everything seems to have grown more definite in our day, and accuracy is more demanded than ever. The lawyer must be always ready to show that he thoroughly understands his case, and that he can with exactness apply to it the guiding law, which he must also thoroughly understand. I suppose that every lawyer of some practice has noted how rare a talent it is in men to report the substance of anything accurately. When you are trying a case and the evidence has developed that one not thought of before must know important facts, and you have him sounded by your client or your junior and a favorable report is brought back, you will do well, if you can, to hold a brief colloquy with him before you swear him. Many listeners hear only what they wish to hear, and this is a large class; and a still larger class misapprehend what they do hear. The flying rumors that go around in society are exaggerated instances. At last, in their most grotesque form and in the widest departure from the truth, they are but the result of many misapprehensions concentrated. Patient attention to your client will make you understand him at last; by patient attention you will master the obscure narratives of the witnesses, the pleadings, a mountain of documents, the resources and designs of the adversary, and by the same power you will time and again extricate your case from decisions and apparent constructions of statutes which for a long time menaced it with certain ruin.

§ 202. Therefore let the lawyer carry all of his cases with him everywhere. On every particular one he should be always able to pass a Socratic cross-examination. Socrates held that no man was master of a subject until he could handle it from all points of view. This knowledge is not to be imparted by a set discourse. A man must acquire it for himself. It is in the head, in the comprehension, rather than in the memory. This is illustrated in the case of an honest and rightly seeing witness under a searching cross-examination. He will be asked many questions which he has not anticipated, but if he keeps his coolness he will answer aright and all his answers will be consistent. So long as he stands upon his own knowledge he cannot be made to contradict himself. And thus a lawyer must know his case, so that he may be able to meet at once any attack of the adversary, although he may not have foreseen it. As soon as he understands the attack he can show that it is inconsistent with what he knows the case to be.

§ 203. The grand result of thorough preparation, where the lawyer has been patient, attentive, industrious, and free from passion, is this accurate and well-in-hand knowledge. We observe many of our brethren groping in the dark, as it were, in search of they know not what. It is this which they are unconsciously looking for. The lawyer who has such a knowledge of his case can be put down only by equal knowledge and the right on the other side. In intricate cases, he who has got the details by heart, so that he can present them all from innumerable stand-points, is an over-match for an antagonist who has only a smattering of the case, even where the right is strongly with him. How does this victorious knowledge come?

It is mainly character. The self-collected, thorough-bred lawyer, exempt from all vanity, self-reliant without being self-conceited, who saves all his passion for the jury, who hardly looks any unpleasant anticipation full in the face, and who is incessantly testing in cold blood the sanguine representations of clients and their partisans and his associates, will acquire a profound familiarity with the case in an incredibly short time. If one wishes to win by deceit and perversion he will study deceit and perversion; if he belongs to those over-sanguine people who believe that no disaster can ever befall, he will build perilously on hasty assumptions; but if he fully understands how a trial is a thorough discussion of the questions made by the law and evidence, he will seek to come with the requisite knowledge for such a discussion. And this knowledge produces the "vigorous verdict-getting counsel."¹

§ 204. How empty and vain are the talents of perversion arrayed in a real court against this true mastery! The great lawyer whom we sketched above² was so little solicitous for the last word that he never would manoeuvre nor wrangle for the right to conclude. He often made a gift of it to his adversary. But it was a world's wonder when he lost a good case. His knowledge of any matter he was trying was so accurate and ready that no misrepresentation could prevail against him.

§ 205. The preparation which the great Rufus Choate habitually gave his cases should be ever held up before the young lawyer. The following is told of it:—

¹ Lord Campbell's Life of Lord Brougham, 256 (London, 1869). The words quoted are a panegyric of Mr. Clarke, leader of the Midland Circuit.

² *Ante*, § 78.

"What laborious and careful and plodding preparation he made in the plainest of cases! When occasion demanded he was the readiest of men; and he undoubtedly did enter upon cases without much preparation.

"But ordinarily his preparation was elaborate. He loved to exhaust the subject. His respect for the bench led him to make thorough preparation of the law of his case, and when his case was for the jury he remembered the twelve who were to pass upon the facts; for he always, as he said, went in for the verdict. . . .

"I have known him to hold two consultations with his junior, preparatory to a hearing in the probate court on some motion for a new bond; and I have known him equally elaborate on a motion to amend some interlocutory decree in the Superior Court. Those who have been his juniors in the preparation and trial of cases will remember how he made them work."¹

§ 206. A later biographer quotes Mr. Bell's account, which we here transcribe:—

"Mr. Choate's method of preparing his cases for trial and argument depended so much upon the varying circumstances of the cases, that it is very difficult to say that he had any particular plan. But this always was his practice when he had time for it.

"If for the plaintiff, a strict examination of all the pleadings, if the case had been commenced by others, was immediately made, and, so far as practicable, personal examination of the principal witnesses, accurate study of the exact questions raised by the pleadings, and a thorough and exhaustive preparation of all the law upon those questions. This preparation completed, the papers were laid aside

¹ Parker, *Reminiscences*, 111.

until the day of trial approached. At that time a thorough re-examination of the facts, law, and pleadings had to be made. He was never content until everything which might by possibility bear upon the case had been carefully investigated and this investigation had been brought down to the last moment before the trial.

"If for the defence, the pleadings were first examined, and reconstructed, if in his judgment necessary, and as careful an examination of the law made as in the other case.

§ 207. "In his preparation for the argument of a question of law, he could never be said to have finished it until the judgment had been entered by the court. It commenced with the knowledge that the argument was to be made; and from that time to the entry of the judgment the case never seemed to be out of his mind; and whenever and wherever a thought appropriate to the case occurred to him, it was noted for use. It would often happen that the case was nearly reached for argument at one term of the court, every possible preparation having been made, and the brief printed; yet the term would end and the case not come on. The former preparation then made but a starting-point for him. At the next term a fuller brief appeared; and this might happen several times. The finished brief of the evening had to be altered and added to in the morning; and it frequently went into the hands of the court with the undried ink of his last citations. If after argument a case uncited then was discovered, or if a new view of it occurred to him, the court was instantly informed of it.

§ 208. "And so in the trial of a case at *nisi prius*. Every intermission called for a full examination of every

law-book which could possibly bear upon questions already before the court, or which he proposed to bring before it. No difficulty in procuring a book which treated upon the question before him ever hindered him; it was a mere question of possibility."¹

§ 209. His biographer also says of him:—

"In the preparation of a case he left nothing to chance, and his juniors sometimes found themselves urged to a fidelity and constancy of labor to which they had not been accustomed."

§ 210. Let the young lawyer not be deceived. The diligent preparation made of his cases by Choate is far more instructive and far easier to emulate than the eloquence and success which have become the renown of the great advocate.

§ 211. Of Aaron Burr, who according to Mr. Parton was one of the most successful of all lawyers, the latter says:—

"In preparing his cases for trial he was simply indefatigable. While there was an authority to be examined, while there was evidence to be procured, while there was an expedient to be devised, his efforts were never relaxed. And he gave no rest to his adversary, pursuing him with notices, motions, and appeals, improving every advantage and exhausting all means of annoyance; until from very weariness and despair sometimes the enemy has capitulated. Burr not only labored himself to the uttermost of the powers of man, but he had the art of exacting from his assistants an equal diligence. There was no resisting his requirements. Assistant counsel would receive notes from him at midnight when they were asleep, demanding instant

¹ Brown's Life of Choate, 3d ed. (Boston, 1879), 419-421.

replies, which obliged the drowsy men of the law to refer to authorities and examine papers. On the day of trial he had his evidence, arguments, and authorities marshalled in impenetrable array. Every possibility had been provided for. No man at the bar could ever boast of discovering a flaw in his preparation, or of carrying a point against him by surprise."¹

§ 212. Non-preparation or hasty preparation against thorough preparation is empirical matched with scientific and rational knowledge, and as the mob against regular troops. Good luck and accident will sometimes lead the unprepared to success, but in the average he will be beaten and hardly understand why.

§ 213. We guard our student, however, against conceiving us to advise him that all things can be anticipated and provided for. We mean no such thing. The lawyer approaches the trial as the general goes to the field, furnished with knowledge of as many particulars appertaining to the business in hand as can be had in order to act on his own line and also be ready out of this knowledge to meet with new movements of his own any of his adversary's.

§ 214. We have one thing more to say before closing the chapter. No adversary is so weak as he who fumes with impatience at any opposition or hint of danger. Some lawyers seem to believe that Providence sends them nothing but good cases, and resistance infuriates them as though it were an attack upon the very foundations of all justice. But the good lawyer, the veteran of a thousand fights, the cool-headed champion who has time and again won against odds, relies on his case as he sees it from his standpoint, and he never feels sure of victory before he has

¹ Parton's Life, 147.

conquered. His exertion and vigilance do not cease till the final judgment. His own ingenuity teaches him that the resources of the other side may have been underestimated. He leans not on Providence nor good luck, nor on the manifest justice of his cause. He stands on the law and evidence as he believes they will affect judge and jury. He essays to have combinations superior to those of the other side.

CHAPTER V.

PLAN OF CONDUCT.

§ 215. THE previous stages treated in our Chapters I. to IV. are windings or bits of flat which permit no distant prospect. While the genuine lawyer has constantly made an earnest effort to do all the different items properly and to co-ordinate them rightly after they are done, yet their consistency and propriety as parts of the whole which they constitute, and that he has throughout been guided by principle, have been dimly felt rather than clearly seen. But in the subject of this chapter we attain the point of highest altitude in the conduct. From this eminence one can look back to the very commencement, rectify any departure from the true course, and, what more concerns us now, with his ultimate purpose at last in distinct view, he can dispose the particulars and direct the future progress in such sort as to lead his case steadily on in the road to its most favorable event. The wise plan, in the light which it throws upon the goal and the way thereto, is the very essence of preparation. It is the special and the highest business of the leader. When the success of such pre-eminent advocates as Erskine and Choate is understood, it is found to be due to the wisdom with which they discerned the material and decisive, rejected the unimportant, and premeditated their line of action, far more than to the

effect of their renowned eloquence. It is not to be forgotten that Scarlett and Mason, who cannot be ranked with the eloquent, won as large a proportion of verdicts as the brilliant orators.

§ 216. Having thus outlined the importance of our particular subdivision, we must, before going on with its special treatment, again remind the reader how awkward it is to discuss that as a series which is non-serial in its nature. The plan of managing the attack or defence, and the other parts of preparation, have been growing together and almost inseparably from one another. The lawyer has caught at different times glimpses of its several features, and his conception of it has become more and more definite. The final construction is, however, the last work of preparation, when the counsel feels that his mastery of the case is thorough, and he fully grasps every point of offence, defence, or avoidance. Then and not till then is he to put the finishing touches to that which has been almost complete, it may be, for some time.

§ 217. The general before he takes the field makes a plan of the campaign; and so, by a metaphor which will not, we hope, be deemed too bold, we apply the word "plan" in the conduct of litigation. In the talk of the bar we have another synonym. Says one of his adversary, "I do not yet see what is his line." Thus Choate is reported by Mr. Parker as saying of Professor Webster's counsel, that they "should settle on their certain line of defence," etc. The word which we use, however, is by far the best that we can think of, and is much superior to the more commonly used "line," which is a metaphor almost unintelligible, and when it is understood has a sense too restricted for our purposes.

The word "theory" is used almost synonymously. Judges and counsel often speak of the plaintiff's theory and the defendant's theory. But the right theory, that is, the one which includes all the points in the best possible way for you, taking correct note of the strong and weak parts of your side and those of the adversary, is really but the true view of the facts of the case, or, better still, their explanation and reconciliation, and this theory is the prerequisite of the good plan.

§ 218. The essential of a good plan of conduct is that it embrace all the materials of your side, whether they be law points, combinations of fact, or grounds of excitation ; such materials being arrayed in the proper order to support your own intended aggressive or defensive, and to provide against the operations of the adversary. Or, as we may define more shortly, the plan of conduct is your intended method of using the results of your preparation to vanquish the adversary.

§ 219. Napoleon said, as we have already quoted, that the whole of the art of war is in being the stronger on a certain point. The whole of the art of managing litigation is likewise in being the stronger on a certain point. As we wish to impress the student with the saying of Napoleon, we will illustrate it by two celebrated examples. At Marathon, the Persian army compared with the Greeks was as the sands of the sea-shore. The Greek commander came out confidently from behind the walls and offered battle in the open field. He did not oppose, as a mediocre general would have done, his best troops, but he posted his slaves against the formidable Persians and Sacians in the centre, who were the chief reliance of the enemy, while he arrayed on each wing those free-born

volunteers who, as we are told, were aflame with an incredible ardor of fighting, in front of countless hosts of undisciplined savages placed by the enemy, not anticipating the novel dispositions of Miltiades, where, as it was thought, they would be out of the way. The Greeks came forward on the run, and the two armies closed. The massive Persian centre, with resistless momentum, broke the opposing line, and presently was chasing fugitives everywhere. But the Athenian wings, counting the numbers of their adversaries only as so many tokens of victory, were also advancing, spreading panic and rout before them. The Persian centre found that it had spent its force in destroying a few of its feeble opponents and in trying to catch the rest. Out of breath, it now saw two conquering Greek armies in the rear, as it were, and all of its supports going to pieces. The Persians and Sacians also fled ; and the immense horde of invaders paused not in their camp, but were beaten to their ships.

§ 220. Many generations have meditated over the battle, and they cannot discover how the Greeks could have done better. Had Miltiades ranged his choice men against the centre he would have been crushed at the outset. But, with a genius to which all subsequent civilization should do reverence, he evaded the opposeless column and indirectly overthrew what he could not directly encounter. His plan was complete : that is, it rightly marshalled all of his strength in order to sustain itself and withstand the formation and designs of the enemy. The rapid charge with which he began was the finishing work of perfection, assuring the whole. It was a mask that concealed his superb dispositions, and it gave no time to the enemy to conform his own accordingly.

§ 221. We next give the plan of another battle, — that of Epaminondas at Leuctra. Instead of evading the special strength of his antagonist, he met it with a superior force in front. His army appears to have been smaller in numbers than that of the Spartans and their allies. The Spartans had been the terror of Greek and barbarian ; and Epaminondas, rightly judging that the main battle would be offered by these redoubted veterans, held back the rest of his men and bore down the charging Spartan phalanx by a counter charge of the Sacred Band, backed and propelled by a column of fifty shields from behind, — a formation as superior to that of his enemy, as an ironclad is to a wooden ship of equal guns.

§ 222. The circumstances of the two generals show the plan of each to have been proper. Miltiades was right to dodge the onset of the massive centre in order to take it at advantage afterwards, and Epaminondas was right in engaging at once the flower of his enemy in direct conflict.

The reader must not consider these grand examples as more than distant analogies. Warfare and litigation have their several spheres, which differ perhaps more often than they are alike. It is only profitable to touch on the real correspondences of the two in leading principles. And we think that the student will presently see a good use made of the foregoing treatment of plans of battle.

§ 223. We enforce the importance of the subject of the chapter to the practitioner by the example of Choate, of whom it is said that "He had a plan for the trial of every case, to which he clung from the start and to which everything bent. That plan often appeared late in the case, perhaps upon filing his prayer to the court for special rulings to the jury." ¹

¹ Brown's Life, 3d ed., 421.

§ 224. We will now give several instances of plans, beginning with the less complex ones.

“In an insurance case we were for the plaintiff. A vessel had been insured for a year, with a warranty that she should not go north of the Okhotsk Sea. Within the year she was burned north of the limits of the Okhotsk Sea proper, but south of the extreme limits of some of that sea's adjacent gulfs. The defendant set up that there was no loss within the limits of the policy; and numerous witnesses had been summoned by both parties; — on our side, to show that by merchants the Okhotsk Sea was considered to include the bays and gulfs; on the other side, to prove the contrary. A protracted trial was expected, and everything had been prepared. As we were walking to the court-house, he said, ‘Why should we prove that we were not north of that sea? Why not let them prove that we were? What do you think of it?’ ‘It seems to be the right way, certainly,’ said I. ‘Let us do it; open the case on that idea.’ I did so, and put on the mate to prove the burning at a certain time within the year. No cross-examination followed; and we rested our case. The other side was dumfounded. They had expected that we should be at least two days putting in our case on the other theory, and had no witnesses at hand. They fought our plan stoutly, but the court was with us, and they were obliged to submit to a verdict in our favor. The case lasted one hour.”¹

§ 225. A local statute allowed a certain number of years of adverse possession of land under a *bona fide* claim of right to give the occupier a prescriptive title, and the defendant had occupied for three times the space of the statutory term. The plaintiff — who was without doubt the

¹ Mr. Bell, as quoted in Brown's Life, 3d ed., 421, 422.

true owner, if this prescription could be got out of the way — brought his action of ejectment, and after making out a *prima facie* case of title, as he easily could, closed his evidence. The defendant then proved his long occupation by many witnesses, himself among the number. But from the cross-examination knowledge by the defendant of the plaintiff's right and recognition of the same, at a time not long preceding the commencement of the occupation, was clearly shown, and many other facts were brought out which, with the knowledge and recognition mentioned, completely disproved the alleged *bona fides* of the adverse possession. The defendant's counsel seemed to have anticipated that the plaintiff would try to show that the latter had been under such a disability as would prevent the prescription, and to meet this point he was well prepared. But the plaintiff's lawyer by carefully attending to his business had found out that he could make the proof upon which he relied by the witnesses of the adversary.

§ 226. These are easy plans, but such are not therefore to be despised. The greatest results and the most splendid successes often come from operations so simple and plain that all the world then wonders how there ever could have been any doubt as to the event of the cause which has won. The plan of the battle at Leuctra was no more intellectual exertion than that last narrated. The twenty-one years' adverse occupation looked as formidable to the community as the Spartan prowess seemed to all Greece; and yet when we calmly contemplate what was done to both we see that the unexpected victories were no great reason for boasting. An over confident adversary was merely shown in each case that what he thought was his resistless strength was but a shell imposing its appear-

ance for substance upon people who did not choose to look steadily.

The grand element of all true courage — that greatness of mind which has led safely out of what seemed to be the most complicated involvements of peril — is just daring to contemplate things composedly for yourself, and with your own eyes. To join this hardy inspection and undaunted gaze to the character which never acts save with an intelligent purpose, is to have the basis of that genius which vanquishes on the field and in the forum. Nine tenths of what other people take to be difficulty insurmountable are to such a man mere shadows, portentous only in the imagination, as “black Vesper’s pageants” are to children.

§ 227. The examples of simple plans which we have given offered opportunity for ingenuity and stratagem. But there are many cases — probably a large majority of those contested — that, after the maturest study, show but a single issue, which is conspicuous and unavoidable. In these the plan needs no study, for it is apparent that the contest will be one of weight or strength only, and not of skill. And there are many others in which a bundle of controversies, as it were, will often be found. You will seldom see a case involving much property or important rights turn upon a single question. You will generally observe that both the plaintiff and the defendant instinctively seek to increase each his favorable chances by presenting more than one point to be decided, and by making a skilful arrangement of these points. We will give an instance of a plan involving several points.

§ 228. An old man, some years before his death, made a voluntary conveyance of a parcel of land to one of his

sons. After the death of the father, intestate, the land was sold in bankruptcy as the property of the son, and was bought by A. At this sale notice was given by an agent of the creditors of the father that they claimed the conveyance to the son was void because of his mental incapacity at the time. The bankrupt was then a party defendant to a bill in the State court brought by these creditors, and he had answered the same, insisting on the validity of the deed. The sale in bankruptcy and the purchase by A were both effected before the final decree in the bill. A had been put into possession, and the representative of the intestate, who also claimed to be a receiver, recognized his right to the land. Some weeks afterwards a decree was had in the bill authorizing a sale of all the property of the intestate at private sale by this so-called receiver, including the parcel sold in bankruptcy. The receiver, who had been pretending to hold the land since the sale in bankruptcy under A as A's agent, now sold it without A's knowledge, and put B, his purchaser, into possession, thereby ousting A. The receiver affected to be acting under the decree. A brought ejectment against B, and his proof is arranged here to show his plan.

1. He proved his possession under his purchase in bankruptcy.

2. He then showed title in the intestate; the conveyance of the latter to the son; and the deed of the assignee to himself; when he rested.

3. After the defendant had put in evidence impugning the deed of the father, and proof of his title under the receiver's sale, the plaintiff replied with strong evidence of mental capacity; and he also showed that all of the heirs at law had, in a writing which he claimed to have the

force of their deed, conveyed this land to the son mentioned before it was surrendered in bankruptcy, the plaintiff maintaining that, even if the deed of the father was void, the son had acquired all the interest and estate of the heirs, on whom the title devolved on the death of the ancestor.

4. He then introduced a pertinent record, which, as he contended, showed that the appointment of the alleged receiver was invalid, certain requisites of the statute appertaining not having been complied with.

§ 229. This exhausted every resource of his evidence. If he could maintain the voluntary conveyance, — that is, that the father was competent to make it, — his purchase was undoubtedly good. The evidence on this point was very contradictory.

In case he lost here, if he could uphold his claim that he had the title of the heirs, he would be on his feet again and on firm ground. The jury might believe the voluntary conveyance to be void, yet if they were told from the bench that the writing mentioned was a valid deed, then the position of the defendant, who was urging the invalidity of the voluntary conveyance, would be turned. The character of this writing was doubtful.

But if the plaintiff failed to support the deed of the father and what he alleged to be the deed of the heirs, though he could no longer show title to the premises in dispute, he could still recover on his prior possession, provided he established the invalidity of the receiver's appointment. Here he appeared impregnable. The appointment had not conformed to the statutory directions. The defendant was therefore a mere trespasser, and A could recover of him upon proof alone of his possession, such possession being, as it was, *prima facie* legal.

The first and third parts of the plan were added last in the preparation, and the fourth was not thought of until long after the action had been brought. It could only be made to appear by a careful perusal of a voluminous and almost illegible record. When A commenced his suit he relied only on the validity of the voluntary deed and his purchase before the decree which has been mentioned.

§ 230. This instance has been given in detail because it illustrates nearly all the uses of a plan. In the first place, it is well to note that the plaintiff's case involved questions of law as well as fact. The character of the writing claimed to be the conveyance of the title of the heirs, and whether the appointment of the receiver was valid, were questions of the former kind. The other issues were for the jury, though they would receive instructions as to them from the court. Thus they would be directed that, if the father's conveyance had been proved to be invalid on the ground stated above, then it was for them to inquire if the plaintiff had established his prior possession by credible evidence, and if he had, they should give it effect. So too the court would tell them to allow the voluntary conveyance or not, according to the proof.

If all the plaintiff's positions were right, he had two grounds of recovery, to wit, his prior legal possession and the title of the intestate conveyed to the son. If the defendant overcame the voluntary deed, then the plaintiff might still have two grounds of recovery, that is, his prior possession and the writing executed by the heirs. But if he failed to maintain the conveyance of the father and that of the heirs which he alleged, yet when he demonstrated the invalidity of the receiver's appointment he was sure to succeed, as his prior possession was scarcely disputed.

§ 231. It thus becomes plain that his attack upon the appointment of the receiver was his most important position. If he made this good, there was no possible chance left to the adversary; if he failed, the controversy was at least doubtful. Perhaps it should be said that the probabilities would then be against him. In military language the question of the appointment was the key to the field. The plaintiff's counsel was therefore right in more carefully meditating this attack than any other part of his preparation. Many passages of a long record had to be put together rightly in order to show that the requisites of the law had been disregarded. His adversary, having assumed the validity in question, had industriously essayed to get the preponderance of evidence on the issues as to the title of the intestate. He was struck with astonishment when the plaintiff's plan was disclosed, and he could not maintain the impugned receivership.

It is further to be remarked that this plan not only combined every resource of the plaintiff, but it had the further merit of masking his purpose and of completely anticipating and providing against the case of the adversary.

§ 232. We are now ready to classify plans. They will be found to be fewer than the reader will suppose on his first reflection.

There are, I believe, but two sorts of simple plans, that is, of plans for single issues. The first is where a palpable issue of fact or law is presented by one side and accepted by the other. Thus the plaintiff may say that the defendant owes him money by reason of a contract declared upon. The defendant, if he deny the contract alleged, accepts the issue of fact tendered. Here the party having the superior evidence at the trial is entitled to the verdict. Or the

defendant may admit the contract as recited in the plaintiff's pleadings, and urge that it appears to be an illegal one. Thus an issue of law is presented, which will be settled from the statute-book or other pertinent authority. Both of these instances — the one an issue of fact and the other an issue of law — are evidently similar in nature; for the adversary in each joins in the first issue offered, neither side is evaded or surprised, and the contest is a premeditated and fair trial of strength.

§ 233. The second sort of simple plan is where the issue presented is declined, and you tender another on which you conceive that you are superior. Its effectiveness may be increased by secrecy. Mr. Parton tells of Burr: "He delighted to *surprise* his adversary, to lay an ambuscade for him and carry a case by an ingenious stroke, before the other side could recover their self-possession. It is related that in an ejectment suit to recover a valuable house in New York the opposing counsel had expended their whole strength in proving the genuineness of a will, supposing of course that that was the only point susceptible of dispute. What was their surprise to find that Burr's main attack was against the authenticity of an ancient deed, one of the links of the title which, having never before been disputed, had been provided with merely formal proof. The jury pronounced the deed a forgery, and Burr's client lived and died in possession of the property. Two courts have since pronounced the deed authentic."

This kind of plan resembles the turning manœuvres of warfare by which an offered battle-ground is rejected and an engagement forced somewhere else.

§ 234. And it may apply to issues of law as well as to issues of fact. I once witnessed the trial of a case in

which some shippers sought to recover back from a railway an alleged overcharge by the latter. The suit had been brought in the county where the produce was shipped, while the charges had been paid in a distant county by the factor of the shippers. The counsel for the railway demurred on the ground that the court did not have jurisdiction, as it was enacted that suits against railways be brought in the county where the contract had been made. He argued that, if the railway was liable for the overcharge, it was upon the contract implied by the law to refund the illegal exaction, and that, as this overcharge was paid in the other county, the contract was implied or made therein. The plaintiffs' counsel conceded in reply that he might have sued in the county last mentioned on the implied contract, but he averred that the law had implied another contract for his benefit, which was that the railway should not charge above the charter rates, and that this was implied or made in the county where the produce was received by the railway; and that the gist of his action was a breach of this last-mentioned contract.

Now whatever the reader may think the law to be, this dodge, as it were, of the plaintiffs' counsel will illustrate that issues of law presented may be evaded, and others tendered in their stead.

§ 235. So much for simple plans. We must glance again at the complex plan. It embraces more than one issue or point of controversy. It may present both questions of fact and of law, and it may directly meet the issues raised by the other side, or dodge them as we have suggested. The same plan may meet the issue on some of the points of controversy and evade it on others. The instance of the ejectment by A against B given above in

this chapter illustrates this. Such plans are of infinite range both in copiousness and variety, and the subject becomes familiar to the practitioner only after long experience.

§ 236. If you observe veteran lawyers you will see that generally their plans are more straightforward and less complex than those of their juniors. The simpler the plan can be made the better, provided nothing important be sacrificed. The lawyer must weigh everything. His acumen and judgment must find and reject all the trivial and slight and include all the good. For instance, if, when defending a surety, he could support by evidence the illegality of the consideration of the contract; that the debt had been paid; that the principal had been indulged by the plaintiff to the detriment of the surety; and that the right of action is barred;—he should plead every one of these points and prepare on all of them. He is wrong to throw away a single chance of success. But if he can only maintain one or two, let him dispense with the rest. The simplest plan that is exhaustive of all your resources is the desideratum. It is more easily understood and retained in mental grasp, and therefore more surely executed. Nothing so enfeebles a lawyer as to cultivate a tendency to make every possible point. Reflection, observation, and practice should teach him the difference between the select positions carefully to be attended to, and all the other matters which will be rightly disregarded. But we would not have him hypercritical and over-nice. While he should discard everything of unimportance he ought not to be too severe a judge against his client. He should give him the benefit of all reasonable doubts, to use the language of the criminal law.

§ 237. We must especially note the attention that weak points deserve. It often requires great exertion and extraordinary tact to cover them. Thus a policy on the stock of a mercantile partnership had, after being assigned, been sent to another State for collection, where certain creditors of the firm — which, bear in mind, had failed in the mean time — contested the validity of the assignment as against them. The counsel of the assignee, who under the State decisions had to show that the assignment was for a good consideration and after the occurrence of the loss, discovered that his client once held a demand against the firm for which he took the individual note of one of the members and that the consideration of the assignment was the payment of this note. The contesting creditors were not aware of this fact. They were confident that they could prove the assignment had been made after the service of their garnishment, and thus get rid of it. In this they were mistaken, as the counsel for the assignee had ascertained from the subscribing witnesses to the assignment and from certain agents of the insurance company to whom the policy had been presented after the assignment. But if he called these subscribing witnesses they might under cross-examination prove what was the consideration of the assignment, that fact being within their knowledge. This would be *prima facie* to place his client in the predicament of a separate creditor, who could take nothing of the firm assets until all of the firm debts were paid. He provided this way around the difficulty. The assignors and subscribing witnesses residing outside of the jurisdiction, he availed himself of the rule established by the decisions that he could prove the execution of the assignment by proving their handwriting. The assignment re-

cited that it was for value, which under the authorities was *prima facie* proof of the consideration required to be shown. He proved the handwriting, and also that the assignment had been seen by them before the garnishment was sued out, by witnesses who knew nothing of the consideration. So the ugly adverse fact was never disclosed to the enemy and the assignee collected the policy.

§ 238. But then you have weak points that it is impossible to conceal, and if you cannot defend them you will lose perforce. We will make one of the most celebrated of American cases serve as an illustration. The Commonwealth had provided almost irrefragable proof that the human remains discovered in a furnace which had been in the exclusive use of Professor Webster since the disappearance of Dr. Parkman, with the murder of whom the former stood charged, were those of the latter. The counsel of Webster wished to associate Choate. The latter was convinced of the impolicy of contending that Parkman had not died in the presence of Webster at the time and place laid, and he could not be persuaded into adopting the proposal of the counsel to prove that the former was living for some while afterwards and had been seen at many different times in the streets,—a fact which was denied by his own family, the people of all the world to know it if it existed. The great lawyer insisted that the killing should be virtually admitted. But the defendant, his advisers, and his friends were set against this. They did not employ Choate; and they rested the defence upon disputing the identity of the remains and any participation of Webster in the killing. They ran their heads against a stone wall, and the prisoner died at last under the hands of justice, having confessed the homicide.

§ 239. Now let us hear what was Choate's plan. It is given in his own words, in a subsequent conversation with Judge Lord : —

“There was but one way to try that case. When the Attorney General was opening . . . and had come to the discussion of the identity of the remains, . . . the prisoner's counsel should have risen and said, substantially, that, in a case of this importance, of course counsel had no right to concede any point, or make any admission, or fail to require proof, and then have added, ‘But we desire the Attorney-General to understand, upon the question of these remains, that *the struggle will not be there*. Assuming that Dr. Parkman came to his death within the laboratory on that day, we desire the government to show whether it was by visitation of God, or whether, in an attack made by the deceased upon the prisoner, the act was done in self-defence, or whether it was the result of a violent altercation. Possibly the idea of murder may be suggested, but not with more reason than apoplexy, or other form of sudden death. As the prisoner himself cannot speak, the real controversy will probably be narrowed to the alternative of justifiable homicide in self-defence, or of manslaughter by reason of sudden altercation.’

“He then said, ‘The difficulty in that defence was to explain the subsequent conduct of Professor Webster,’ and he proceeded . . . to show that the whole course of the accused, after the death, could be explained by a single mistake as to the expediency of instantly disclosing what had happened ; that hesitation, or irresolution, or the decision, ‘I will not disclose this,’ adhered to for a brief half-hour, might, by the closing in of circumstances around him, have led to all that followed. Having concealed the occur-

rence, he was obliged to dispose of the remains, and with the facilities afforded by his professional position." ¹

It is now a wonder that the plan was not adopted. Though it never had existence beyond a proposal which was scornfully rejected, we believe that it will add as much to the future renown of Choate as any of his greatest orations.

§ 240. The last is an illustration really of a right theory rather than of what we mean by a plan. Still it is so close to our present subject as to be in place here. For if the plan you adopt is founded on a bad theory, it must needs be bad.

There are difficulties which often confront you for a long time, but which you can at last get around. Thus a plaintiff had no other means of making good the most of his account than by a witness who had been his clerk when it was made, and who was now in the defendant's employment. The facts had to be corkscrewed out by a long examination, and by reason of the witness's stubborn resistance the plaintiff's case was left with such feeble support that the jury disagreed. But the plaintiff had found his deliverance. When the witness was turned over for cross-examination the opposite counsel began by asking him to point out the items which his employer disputed. In the presence and hearing of the defendant, the witness in reply to the question selected out of the long bill of particulars only four. These the plaintiff could prove by other testimony. At the next trial he proved the question and how it was answered in the hearing of the defendant, and this was held by the court to be an admission by the latter of all the items but the four. Then having proved

¹ Neilson, *Memories of Rufus Choate*, 18, 19.

the four, the plaintiff rested. This time the defendant could not escape.

§ 241. We have not space for further illustration. But we remind you that you ought to conceal, if you can, the existence of your weak points, by reticence, bluff, feints, or whatever ruse will serve your turn ; and when conspicuous difficulty is most menacing and your adversary swears that he has you on the hip, look about you in tranquil search, and you will often find safe retirement or a sure road to victory. You must be fully aware of your necessities, of your resources, and of the operations of the adversary, sure in applying legal rules and evidence which make for you and quick to find expedients and shifts to compensate for the advantages which you must sacrifice. All this is an unknown art to many of the profession. It is well for the young lawyer to get an inkling of it at the outset of his career. He is not to balk the right by concocting fraud. But he ought to learn that the most righteous cause often requires to be fenced by wiles or rescued by stratagems, and these then become the instruments of justice.

§ 242. Now as to what we have called the third element of litigation. We may remark that it often runs into the other two, and we have therefore now and then treated it unconsciously in the foregoing ; and we must in several places later on, go over some of its remaining details. We begin here by distinguishing between persons and actions as causes of favor or disfavor. The former division is much more easy to handle than the latter. We know at once the different people who as parties attract or repel sympathy. Thus a counsel for a non-resident woman suing a rich defendant was right to avail himself of the first opportunity to prove that his client was born

in the county where the case was trying. The widow who brings a civil action for the homicide of her husband, especially if she is poor and has several children, is generally a favorite with juries. But your client may belong to one of the preferred classes, and yet his part in some transaction arouses the feelings of people against him. Ingratitude, coldness towards friends, avaricious demands, fraudulent or oppressive conduct, disregard of the common sensibilities,—such are some only of the things we are now considering which may seriously damage a cause otherwise strong. The use to be made of the predilections for or against certain persons or actions just mentioned is an important lesson. We take for granted that the preparation has given all of them in the particular case due attention.

§ 243. How will you have them efficient when they make for you? and how will you break their force when they are opposed? The answer to the first question is found mainly in two particulars: you must support them by at least an appearance of merit in law or fact, and you must abstain from urging them immoderately and too zealously. If you stand upon them alone the instructions of the judge will generally be decidedly adverse, and the jury may be ashamed to follow their inclinations. Even if you win and hold against the motion for a new trial, the court of errors may set aside the verdict with such determined promptness, or even with such directions, that you are deprived of all hope. You must learn the art of giving prominence to the legal and evidential resources of your case while you seem to allow the others to put themselves forward of their own accord.

§ 244. We will give an example of the good effect of moderation in attacking a transaction which was closely

akin to forgery, — one of the most disreputable of crimes.

A lady of respectable standing had brought suit on a promissory note. The plea was the statute of limitations, with the further allegation that the date of the note had been altered. The plaintiff's counsel claimed that his client's character was wantonly impugned by the defence, and he seemed to regard this position as his trump card. The defendant's evidence was circumstantial, making a weighty case, but not conclusive if the plaintiff's honesty was unassailable. If there had been alteration it was fraudulent, and to establish such an alteration would have under the code prevented a recovery, even if the note was not barred. The counsel for the defendant, with some risk of not being able to establish clearly the date for which he contended, and thus support the plea of the statute of limitations, disclaimed any intention to allege that the alteration was fraudulent. This good lady, he urged, merely did what she thought was prudent and right; that is, she tried to keep her note from going out of date. He got the verdict. The foreman told me that all the jury at first leaned to the plaintiff, deeming the plea almost libellous, but in consequence of the disclaimer mentioned they could consider the evidence without bias, and at the last they unanimously agreed that the plaintiff had altered the note with a dishonest purpose.

§ 245. We insist especially that you do not press your advantages too hard. Here is perhaps the best place to find good examples of the effectiveness of that suggestive understatement which Scarlett insists upon in the speaker. If you collect a great store of facts, and make an elaborate presentation by your evidence of the acts which you would

have the jury stigmatize, you are always in danger, except in cases of the most marked and pronounced type, of appearing to persecute, and of exciting thereby sympathy for the persons assailed.

§ 246. One of the most delicate problems of all conduct is how to guard those parts of your case which are exposed to the censure of the feelings. It is all-important that you fully understand your weakness. Of course you will carefully look for all the evidence that will color the particular transaction in your favor or dissipate an adverse misapprehension of it. You will be wise to enlist a stronger prejudice or passion on your side, as the defendant, in the illustration just given, vanquished the popularity ordinarily attending the case of a lady by adroitly setting against it the abhorrence with which fraud is universally regarded. Or you may form an alliance with a strong party or a popular cause. A decisive effort somewhere else, raising an issue which makes irrelevant the point you fear, or which draws off the force destined for its assault, may be your policy. Sometimes a persistent ignoring is all that you can do. I have seen this shift succeed against great superiority on particular material points. Especially do we advise you to add to and strengthen your evidence industriously, as the confidence of the adversary in his emotional ascendancy will usually make him negligent.

§ 247. The general conclusion to be derived from our discussion is, that in forecasting your operations you must be as much alive to the effect which the facts on each side will work upon the feelings as you are to the maintenance of your propositions of law and evidence. Often, as we have already hinted, your case will find the jury indifferent. But there is a large proportion of serious litigations — per-

haps more than a fourth — in which emotion is a potent factor. It often turns the scale unconsciously to the jury and lookers on, who all are sure that the verdict is fairly won by the evidence. It is the business of the lawyer to discern these subtle influences, and also to know the orbit of manifest excitement. The required talent will hardly ever rise to the sure vision with which he detects legal and evidential weight ; it will rather, at its highest, belong to what we denominate instinct. Yet the talent can be trained, as the amendment of the born orator shows. And we now leave the special treatment of the subject, by saying you must not rest in marshalling the evidence and points of law, however resistlessly you may seem to put them. Scheme also to have the feeling excited by the case help your side.

§ 248. We have in the foregoing brought out the general idea of Plan of Conduct. We are now to go through a series of minor parts of the subject which are of great concern to the practitioner.

We begin with secrecy, the value of which we have already hinted. No prudent general will in ordinary circumstances betray to the enemy his intended movements. In litigation, secrecy is not so important. There are many controversies where a practising lawyer will see everything material belonging to either side at the first glance. The issues are so simple, the law so plain, and the evidence so manifest, that it is idle to essay concealment. But in cases of a different kind, where the facts are manifold and the governing law hard to find, and where there are evidently great stores of evidence at the command of the adversary, you will be blind and foolish to publish your plan. Your case is entitled to all the advantage which you can

lawfully win. You are not to forge precedents to dupe the judges or to suborn witnesses to hoax the jury ; but your client can rightfully exact of you that you procure for him the most favorable judgment possible under the law as the judge holds it to be, and the evidence as the jury see it. You may obtain by honest argument a decision from even a respectable court of errors which another will be in haste with good reason to reverse. You may get a verdict which, though it is sustained by the proofs adduced, is yet decidedly against the weight of that which could be adduced. You should get this decision or verdict, provided you get them honestly. If you succeed by superior conduct you have done right, though the real right of the case is against you. You will hardly ever have these victories in the cases last described except by keeping your cardinal propositions of law and fact to yourself.

§ 249. But there are cases where you do well to disclose your plan. Thus Choate said before the trial of Professor Webster that the counsel of the latter should put forth some theory of defence in order to allay the rising popular excitement. This is an instance where weakness and infirmity might possibly have been helped by the publication advised. Sometimes you will find your hand so strong that it will appall your adversary when he sees it. This is often the case when you are arrayed against fraud, oppression, or the other instances of baseness which draw upon themselves the instant condemnation of all honest judges and jurors.

§ 250. The prudent general secures beforehand his way of retreat to be used in case of disaster. Every device possible to diminish risk and uncertainty must be resorted to in the conduct of litigation, and the preparation should

look beyond the rencounter, and provide, if it can be done, the means of obtaining a new trial when one has lost. As the lawyer becomes more and more familiar with the case, he will find suggested along its whole track how his adversary or even the judge may be surprised into some action to serve the purpose just mentioned. Perhaps he is aware of certain peculiar views of the law entertained by one or the other which he may turn to account. The author thinks from his own observation that the most of his brethren, even when conducting important cases, trust rather to their own ingenuity during the trial to provide a ground for another, than to a rightly premeditated plan. It is far better to reinforce the ingenuity, however great, exercised during the short time that the court is engaged with the case, with the usually greater results of long deliberation made beforehand. During the trial the mind is too intensely occupied with the principal business to attend much to anything else.

§ 251. We will now give two examples of premeditating a ground for a new trial.

While A, a young lawyer, was preparing an ejectment for the plaintiff, he apprehended that it would be attempted to examine himself as a witness against his client. This was because of the connection of the opposite counsel with a case tried not long before and recently reported, as it had been carried to the court of errors, in which case this counsel had gained a great victory by making a witness of the plaintiff's lawyer, who testified without objection that he and his client did not have authority to use the lessor's name. A had two demises in his declaration. It is unnecessary to narrate the facts which made him desire that the defendant should offer him as a witness. Suffice it to

say that A felt sure that his testimony would not put him in worse plight, and he could think of no surer ground of a new trial in the event of an adverse verdict, an event which he feared because of his inexperience and his opponent's ability. As he would waive his point by not objecting, he resolved to make a frivolous objection which he believed would not be sustained by the court. On the trial, after the plaintiff made out his *prima facie* case, supporting only one of the demises laid, and had closed, the defendant's counsel offered A as a witness to prove that the suit was brought for the exclusive benefit of the particular lessor whom he believed to be the real plaintiff, although the demise from him had not been supported by proof, and against whom the defendant had a good defence; and the offered witness objected, urging that, as title had been shown in the other lessor, this was an attempt to prove it out by the mere opinion of a lawyer. The objection being unmeaning was overruled with some warmth, and A was forced to tell that the last-mentioned lessor was his real client.

There was a hard contest upon the evidence. The defendant did not connect the lessor, for whose sole benefit he had proved by the lawyer, as recited, that the suit was proceeding, with his defence by any other evidence, and he got a verdict. But the court did not hesitate to grant the plaintiff a new trial when it was argued that the admission of the evidence had violated the rule of law protecting confidential communications between client and attorney. Had A objected on the ground which he expected to use in support of his motion for a new trial, — as the rule in that State now requires, — the excellent judge would have at once sustained the point, and another per-

son present who would have been a competent witness would surely have been thought of by the defendant. This witness at the next trial was in a distant State. The judge was led into his mistake by too quickly assuming that the court of errors had decided in the case mentioned that the counsel was compellable to testify.¹ Had the real incompetency been stated this delusion would have vanished, and had the other witness been examined an adverse verdict could hardly have been set aside. The plaintiff at last recovered his land.

§ 252. The second example is more ingenious. I gathered it from an argument which I heard in the Supreme Court of Georgia between two of the ablest and cunningest lawyers that I ever knew.²

The statute permitted a complainant in a bill in equity to waive discovery and enacted that after such waiver the defendant's answer was not evidence. In this case the complainant — who was a remainderman — had exhibited his bill against the tenant for life, alleging a forfeiture of the life estate by reason of the waste of the defendant. All in the bill that could be said to be the waiver mentioned was the statement that the complainant could prove his allegations without the oath of the defendant. The case had been tried by a jury, as is the custom in Georgia. The counsel for the tenant for life had contended below, as his adversary stated, that, discovery having been waived as to the particular allegations just mentioned, some of these being material and not having

¹ *Adams v. McDonald*, 29 Ga. 571. *Stephens v. Mattox*, 37 Ga. 289, is the case from which the example given in the text is taken.

² *Woodward v. Gates*, 38 Ga. 205. *William Dougherty and B. H. Hill* were the counsel opposed.

been proven, the complainant's case was not made out. But under the instructions of the court the jury had found against the defendant. He moved for a new trial; and it was the assignment as error of the judgment refusing the motion which I heard argued. Several points were discussed with zeal and ability; but a new trial was granted the tenant for life on the ground more strongly pressed than any other, that discovery had not been waived expressly, as the judges held such waiver must be, and therefore his answer was evidence, and it had not been overcome by two witnesses. There was an apparent, but not a real, waiver of discovery. This resistless attack upon the defendant in error was masked under the ground in the motion that the verdict was against the evidence. The counsel for the life tenant, though wonderfully quick-sighted, had never anticipated the plan of his adversary, who had the ingenuity wholly to reverse his position and still hold on to his case triumphantly.

§ 253. As we close this subdivision we remind the student that a lawyer who is expert in setting verdicts aside is a dangerous antagonist. The quality implies so much of readiness and foresight that its possessor usually wins a larger proportion of cases upon the first trial than the average of his brethren.

§ 254. The lawyer is often puzzled to decide whether his attack or defence shall be bold or not. Sometimes he is on the unpopular side, and violence will repel instead of attracting sympathy. Again he will often conduct cases where timidity will ruin him.¹ All the counsel that I can

¹ Miles W. Lewis, of Greene County, Georgia, who died in 1880, was a lawyer whose natural gifts for his profession were out of all proportion to his small ambition. I was often with him or on the other side. I came at

give him in these matters is, that he should be guided by the circumstances and his knowledge of human nature. Generally a conduct *fortiter in re, suaviter in modo*, is the best of all.

§ 255. A difference in the spirit of offence and defence must be considered. There is a natural advantage of the latter, which was noted long ago by the Romans. Thus they said: "If the one holding the affirmative does not cast the onus by his proof, the adversary, though he show nothing, will prevail."¹ "The necessity of proving his case is always upon him who sues."² And they said, still more acutely, "When the right of each litigant is obscure it is customary to give judgment against the plaintiff."³ The most apparent advantage of the offensive is that its course can be accurately premeditated, while the other must often be in peril because of a mistaken anticipation of the intended operations of the assailant. If you observe a large number of the profession you will find that you may divide them into two classes, placing in one the lawyers who attack better than they defend, and in the other those who defend better than they attack. Occasionally you will see a member of the bar who will nearly always be found of counsel for the defendant, while you note another who is so prone to action that he seems to get all the cases which demand the aggressive. Mr. Parker tells us: "Not a great many years ago, a leading lawyer at the

last to discover his peculiar forte, which, as I expressed it, was that he knew better than any of us when to bully and when to beg.

¹ "Actore enim non probante, qui convenitur, etsi nihil ipse præstaret, obtineat." Cod. 2. 1. 4.

² "Semper necessitas probandi incumbit illi, qui agit." Inst. 2. 20. 4.

³ "Cum obscura sint utriusque jura, contra petitem judicari solet." Inst. 4. 15. 4.

Suffolk Bar retired from the active practice of the courtroom, and among other reasons for that retirement he gave this: 'What's the use of going on term after term fighting cases for corporations with Choate to close on me for the plaintiff? If I have fifty cases, I shall not gain one of them.'"¹

§ 256. We will now try to show what are the essentials of a good defence. In many cases you have no opportunity beyond a direct reply. Your part is mere resistance. You only meet the adversary and try to hold your case on the cardinal points. You never drop the defensive, relying all the while upon the general issue alone. Your purpose is merely to draw the game; and much ingenuity may be shown here. I regarded it as high praise which I once heard given a lawyer who nearly always avoided taking an initiative, though he was in large practice. A rival who was often opposed said of him, "He usually acquiesces in your positions and beats you by adopting your theory of the case." The common judge or juror is two-sided. Ordinarily he is inclined to let matters remain *in statu quo* and save himself the exertion of setting them to rights. This *vis inertiae*, as it were, can be turned to great account in the management of litigation by an ingenious practitioner who is so full of it that he always has a plausible reason against any proposed change. The other side shows itself when you hear even a stranger, perhaps as you walk the street intent on your business, make complaint against another. It may be that money has not been paid as promised; it may be a woman asserting to a man that he has abused her trust. You pass on believing that the charge is true, although

¹ Reminiscences, 53.

you heard it denied. Your experience has strengthened the inherited tendency, for you have noted that far more than half of the bills presented in society and of the claims sued in the courts are just and ought to be paid. It is this last-noticed side of human nature which generally gives the superior *morale* to the attack in litigation; and there are advocates in which it is always uppermost in such contagious potency as to bring their hearers in accord. As Shakespeare surmounted the heights both of tragedy and comedy, the ideal practitioner would be perfect in offence or defence as the circumstances dictated. And we see that the average practitioner has a high degree of skill in both, though he is better in one than in the other.

§ 257. But there is a defence which in its nature is offensive. As Ulpian said, "He brings an action who stands upon a plea [other than the general issue], for when the defendant uses such a plea he becomes really a plaintiff."¹ But the resort to the offensive is not alone by means of an affirmative plea. While relying on the general issue, if you marshal the proofs to overwhelm the main witness of the plaintiff, you are acting on the offensive as decidedly as the plaintiff was when he opened. Your purely negative plea is supported by an aggressive, realizing it may be Napoleon's saying, that a strong attack is the best defence. We have mentioned the natural inclination of men to favor the aggressive; and also that it can be thoroughly planned beforehand. This last is the reason why the advantage is usually with the attacking

¹ "Agere etiam is videtur, qui exceptione utitur, nam reus in exceptione actor est." Dig. 44. 1. 1. The bracketed words in the translation are necessary in order to fit Ulpian's language to the pleading of our day.

column in warfare. It has something definite and premeditated to do. The other side only seconds the initiative of the attack, and will scarcely ever anticipate it exactly and precisely. In games, in campaigns, and in litigation, to have the move is worth something. If chances are equal and you give it to the adversary, he will beat or draw if he makes no misplay. You should turn your defence into a real attack, if you have good ground of a cross-action at law or in equity. The plaintiff controls his action. He can dismiss and renew, or shift to some other remedy or forum, and avoid trials until his opportunity is ripe, but the defendant who is nothing but a defendant only parries his adversary pushing for a trial by showing some providential cause. Even when your legal position is mere denial, carry some cardinal point of the plaintiff's case by aggressive disproof, if possible. I have seen more batteries effectively masked and more surprises successfully laid under the general issue than in any other place.

§ 258. So then we advise that you never overlook the advantage of the aggressive. It may be legal, as when you are really plaintiff, or it may be evidential, as when you assail the proofs of the other side. The plaintiff should hold to the initiative, and keep the move through the entire conduct if he can. And the defendant should make an aggressive defence whenever the case permits it. The moment his aggression begins he has the move, and if it has been planned judiciously and executed skilfully he may win the victory. An unaggressive defence requires more vigilance and far more sudden promptness of decision and action than an attack.¹ It is only to be adopted when

¹ In the Epithalamium of Catullus, — an amabosan poem, — the maidens sing first and the youths merely reply. The advantages to the former

there can be no other. Still, as it must be made now and then, it should be carefully meditated by every lawyer. Fancy yourself assailed by a boxer and you do nothing but parry his blows. This is the unaggressive defence. If you catch him off his guard and knock him down, this is aggressive defence, and much safer for you than the other.

§ 259. That the opening attack of the moving party must be premeditated; that he must anticipate the mode of resistance that will be made, and provide the means of maintaining his lodgment first won and of carrying his advance victoriously on; and that the other side must either stand upon the general issue, both as plea and on the evidence, or make an active and offensive movement;—this justifies the notice we have made of this branch of the subject. These operations must be care-

of having the initiative, and the hard straits of the latter, who must answer instantly to the premeditated words of the maidens, are well expressed by the youths in the following stanza:—

“Non facilis nobis, aequales, palma parata est,
Adspicite, innuptae secum ut meditata requirunt.
Non frustra meditantur, habent memorabile quod sit.
Nec mirum, penitus quae tota mente laborant.
Nos alio mentes, alio divisimus aures:
Iure igitur vincemur; amat victoria curam.
Quare nunc animos saltem convertite vestros,
Dicere iam incipient, iam respondere decebit.”

This passage is translated as follows by Prof. Robinson Ellis, of University College, London:—

“No light victory this, O comrades, ready before us.
Busy the virgins muse, their practised ditty recalling,
Muse nor shall miscarry; a song for memory waits us.
Rightly; for all their souls do inwards labor in issue.
We—our thoughts one way, our ears have drifted another,
So comes worthy defeat; no victory calls to the careless.
Come then, in even race let thought their melody rival;
They must open anon; 't were better anon be replying.”

fully prepared, and, what is of more importance to us here, they must be wisely planned.

§ 260. We have noted above that it is better sometimes to put forth, in some sort of a public proceeding in the case, the line of defence. The neglect or improper use of such an opportunity has often caused irreparable damage. It is proper, therefore, to consider the topic again as a part of the subject of this chapter.

§ 261. The lawyer residing in a retired corner of the country is often surprised to find that the leading facts of an exciting case circulate widely from mouth to mouth. Though they are mixed with much fiction and exaggeration, yet they nearly always retain enough of veracity to uphold in some measure, when they are investigated on the trial, the opinion which they have previously produced. And in those communities situated on or near railway lines which now constitute the bulk of our population the newspapers are eagerly read, and every incident of such a case is discussed by the people as soon as it comes to light. If there has been but a partial disclosure, and that of unfavorable evidence, such a decided prejudice against the defendant may be formed that it cannot be overcome. A prejudice of this kind is not to be prevented by canvassing and talk except when the party's relatives and friends are numerous and influential. The better way is to give a satisfactory explanation of the unfavorable facts, supporting it if need be with good evidence, either at the examination by the magistrates, or upon an application for bail, or on some other occasion in court which permits. Of course you must have a real mastery of all the essentials, and a theory so true or plausible that it will become stronger by examination.

§ 262. Now and then it is desirable to suppress investigation and discussion if possible. I remember the case of three persons charged with having murdered a man whose dead body had been found at an early morning hour in a public part of a town. They had borne good characters. For several weeks after the killing there had been no suspicion of them. The case, to use a popular phrase, had been "worked up" by a detective. The evidence was circumstantial, consisting of very many minute links, only a few of which were in the knowledge of any particular witness, and all of no seeming importance until they were collected and arranged. When the arrest was made there was an outbreak of deep indignation against the detective. The defendants did not waive an examination and offer bail, as they could have done under the statute. And so the counsel for the prosecution put together all of the disordered bits of evidence, and the whole was carefully taken down by the magistrate. Public sentiment was revolutionized immediately, and the defendants were committed. Had the examination been waived, the prisoners could have easily given bail. And the evidence would not have been recorded. Had they not been in jail, it would have been at least a year, considering the state of the docket, before they would have been brought to trial; and it might have been longer, there being no clamor against them. In that space of time many of the facts would have been forgotten, some of the witnesses might have died, others have removed beyond the jurisdiction, and still others — not committed irrevocably — might have had their mouths stopped by pity or influence, and an acquittal of all would have probably been the end of the matter. As it was, only one was saved; and some of the better

part of the community always believed that every one of the three was innocent.

§ 263. It may be said that where your case is hard to defend and your client enlists much influence in his behalf it is almost always the right policy to defer as long as you can giving the adverse witnesses an opportunity to testify. In a few months or even weeks their heat subsides, they come in contact with those in sympathy with the defendant, and at last when the State puts them upon the stand they have somehow really become witnesses for the defence.

§ 264. We must say something as to continuances. The grounds are prescribed by the law. If a material witness is ill, or some other cause exists, the court has no discretion and there must be a postponement or continuance. But many times you would put off the trial even when you have apparently collected all of the evidence. Thus, just after a homicide has been committed, the excitement against the defendant is often so strong that he will surely be convicted if brought to trial before it subsides. And in other cases you have a presentiment, which is by no means the tempting whisper of procrastination, that you will become stronger by waiting. This occurs especially when you are defending persons charged with crime upon circumstantial proof, of which I will give a striking instance from my own experience.

§ 265. A shopkeeper had employed B, an ingenious workman who lived near to make him a new cash drawer. Its mechanism was such that screws securing the front piece could only be removed by a particular sort of tool. About a month after the drawer had been made, the shopkeeper, who slept in an adjoining room, when he awoke in

the morning missed his pantaloons. The outside door and the door communicating with the store-room were both open, although he had fastened them just before he lay down. The drawer was gone. After a short search he found it not far from the store, but of course without the money which he had counted the night before. He left the drawer and went back into the store. A few minutes afterwards he saw B looking at the drawer. Then B, who was almost drunk, sauntered into the store. He was wearing a sack coat, and in one of the pockets the shop-keeper saw the peculiar sort of driver necessary to unscrew the drawer. He stealthily took it out, and holding it up before B said: "You stole my money last night, and now here you are trying to face me out with a show of fearless innocence. If it were not for your good wife and her relatives I would get a warrant against you at once. Leave, and never come about me again." B did not reply, and slunk away with a guilty look. The bystanders believed that B was guilty, and as his character was not first rate the community accepted their opinion. But an old man counselled the people not to condemn too soon, saying that, while B might possibly pilfer something to eat when he was hungry, yet he did not have the courage to break the outside door, pass through the room of the storekeeper, who, as he knew, always had fire-arms to hand at night and was a brave man, and then go to work at opening the drawer without having locked the door between him and the storekeeper as he could have done. But the old man was unheeded, and it was resolved that the grand jury should pass upon the matter at the next term of the court.

A very bold burglar, always operating alone as it ap-

peared, had broken into several houses in the neighborhood and carried off valuables from each one. He had been pursued several times, but without effect. His horse had been seen, and could be identified from its unusual appearance, but no one had ever seen the face of the rider. A few months after the cash-drawer had been rifled, a man mounted on the noted horse was seen going towards the town where the shopkeeper lived, where he would probably arrive just after dark. He did come at the time expected, and unawares he rode into the midst of a party waiting to apprehend him. He resisted, and he was shot from his horse. The horse was taken, and when a light was struck the rider was tracked by his blood from the place where he had fallen to a fence beside the road. The fence was bloody. He could be traced no farther, and he never was found. But the pantaloons of the shopkeeper were seen on the other side of the fence, and they were stained with fresh blood. And in a haversack tied to the saddle of the captured horse were some of the contents of the drawer, and also certain articles taken from the houses when they were entered as just mentioned. Thus the truth came out at last. It was plain that the old man was right, and that the entry of the store was the exploit of the daring burglar. Had there been an indictment of B, his counsel, of better insight than the crowd clamoring for an immediate prosecution, would have left no means untried by which the case could be continued and time given for developments.

§ 266. Again, after even the maturest study of the case you feel that you have not mastered it.¹ And there are

¹ Even gifted judges who have considered the arguments of able counsel, now and then need much time to find the true answer. The following

other reasons to be considered. I have known cold-blooded lawyers to take the chances of the death of adverse witnesses whose testimony had not been perpetuated. I knew a shrewd and successful advocate who would try his bad cases and would not try his good ones at the October term in a county where the people always took a more than usual interest in the political campaign, then near closing with a State, Congressional, or Presidential election. It behooves the lawyer to stand ready, if he can, with a good cause of continuance. He is not to prepare a perjured showing. But by always keeping his eyes about him he will generally possess the enviable election of trying or not trying. "It is said when Schomberg was told that the enemy was advancing and was determined to fight, he answered, with the composure of a tactician confident in his skill, 'That will be just as we may choose.'"¹

§ 267. And it is the business of the lawyer preparing to provide against the projected continuance of the adver-

striking instance, from the experience of Judge Bleckley, is given in his own words:—

"The case of *Carswell v. Schley*, 56 Ga. 101, involved the construction of a marriage settlement. It was argued at July term, 1875, and by imperative requirement of the Constitution had to be decided either at that term or the one next ensuing. The court deliberated until the very last day of the latter term, and was still as far as ever from a satisfactory construction of the instrument in controversy. As the hour of adjournment approached, the pressure of the case became intolerable, — especially to that member of the court to whom it had been assigned for special study. In an agony of perplexity and indecision, he walked the floor, meditated, and suffered. All at once, as if by a sort of inspiration, the correct construction occurred to him. On communicating it to his colleagues, it proved as satisfactory to them as to himself, and the case was decided accordingly. Neither in the argument nor in consultation had there been any reference made to the view which presented itself so suddenly, and which finally controlled the case."

¹ Macaulay, *History of England*, Chap. VIII.

sary, if possible. It is not enough that you can accept or decline an offer of trial, but you should be able to force one upon your adversary when you desire. You may succeed if you discover in time the ground on which he relies for a continuance. The law may allow counter showings, or admissions of the expected proof of absent witnesses. Or the showing when scrutinized may be demonstrated to be only apparently good. Or there may be some reply which may avoid the showing. Thus, on a bill in equity to recover a tract of land and for an account of the mesne profits, the complainant, feeling that he had a certain case and being very anxious to try, met a strong showing of the absence of witnesses to disprove the alleged profits of the land by striking out the part of his bill which claimed them. As the defendant was insolvent, the complainant made no sacrifice.

§ 268. So much for the subject of continuances, only we must say that no lawyer should cultivate a slowness to try his cases. There are some who always recoil, and their ingenuity in devising continuances is exhaustless for a long while. The accumulation on many of the dockets, the great impatience with jury duty, and the insufficient judiciary force everywhere, make it nearly always uncertain when even a case where both parties desire it can be tried. In such a state of things the lawyer who is too prone to continue may after a while be practically out of business.

§ 269. We have already given the subject of remedies much attention. It deserves another glance from this standpoint. Sometimes you need several remedies. Thus under the statute it was very doubtful whether it was the business of the Ordinary or the County Commissioners to grant a certain license. An applicant against whom there

was great hostility should have applied to both, and then taken separate proceedings to review each judgment refusing his application. For the time allowed was so short that, when it was decided he had applied to the wrong tribunal, it was too late to apply to the other.

And there are cases of ambiguous right where it is proper that you have different claimants litigate *pari passu*.

But there is another important standpoint. A dexterous use of a new and unexpected remedy often proves very embarrassing to the adversary. See if you cannot make a decisive swoop upon him with an injunction, receivership, removal, or levy. I have known a railway to surrender at discretion to a plaintiff who had blocked its business by garnishing all the merchants along its line to whom it habitually carried much freight.

§ 270. Sometimes you have a group of connected cases, where one should be managed with a view to the others. Thus there may be several defendants indicted for a grave offence, and each one may be entitled to a separate trial. Or there may be suits against a railway by different passengers, all of whom have been injured by the same casualty. And the connection may not be so intimate as supposed in the last two sentences, for one case may involve but a part of the facts of the other. If you can have one tried first, you may discover important secrets; or you may win it more easily than you can the others, and discourage your adversary or secure the good opinion of the public; or you may profitably defer a show of your own strength until it is too late for resistance by the other side. If your desire be no more than to sound the judge and reconnoitre the adverse positions and evidence, it is better to begin with a case in which you have least at stake, or where the adver-

sary is weak, or where you are sure of being invincible. When it is your aim to bring public opinion to your side with the verdict, by all means have the first encounter where your advantage is very great. Thus, in the instance just mentioned of suits by passengers, for the defendant you would prefer to commence with a professional man, who puts an extravagant estimate upon his diminished capacity, rather than with a poor woman claiming compensation only for serious hurt to her person and great pain and suffering.

§ 271. As an example of attaining the third object in the enumeration just made, we give the following. A young man was indicted for murder. His defence was a very strong one, but by reason of the popularity of the deceased a great excitement was raging against him in the public mind. While this was at its highest, a suit for divorce was commenced by that one of his counsel who had borne the principal burden of preparing his case, on the allegation of adultery of the wife committed with the client. The evidence supporting the suit being very weighty, and much of it having got in circulation, the excitement mounted into a fury which threatened to end in lynching. By skilful fence the criminal case was postponed for more than two years. In the mean while the libel had become ripe for trial. One of the counsel for the defendant in the indictment led for the libellant, and this connection gave him opportunity to try the criminal case before the divorce, when the odium of the killing had been almost supplanted by that of the other charge. The defendant was acquitted; and in due time the libellant succeeded. Had the order been reversed, the exposure made by the plaintiff's evidence would have in all proba-

bility hung a millstone of inveterate prejudice around the neck of the young man.

§ 272. In Georgia, joint defendants in a criminal case may be tried separately upon the motion of either the State or the defence. When there is a severance, the State can elect which one is to be first put on trial. This election is a great advantage to the State; and it can be avoided only by a good showing for a continuance by the particular defendant so elected. On the trial of one of the defendants, the others can testify. If they testify for the prisoner, that is an advantage to him of severing. Oftentimes, to avoid more than one trial and to give the defendants the privilege of testimony just mentioned, it is agreed that while all shall be tried jointly each one shall have the others as witnesses. It is my observation that this agreement is usually advantageous to the defendants in two respects. If one or two of them are of good character or have a very strong case, there will frequently be an acquittal of all; and if the defendants are numerous, the jury will compromise by acquitting some and convicting others, even where the evidence against all is strong.

§ 273. There was the same issue in two civil cases. The defendant got a verdict at the trial of the first. A long and somewhat confused document had been put in evidence by the plaintiff, which the adversary had not time to consider closely, the exigency demanding it having occurred suddenly by reason of an unexpected turn in the trial. The plaintiff moved for a new trial upon various grounds. His most satisfactory one was that the verdict was against this document, and his motion was granted on this ground. Had he postponed the hearing of the motion until after the trial of the other case, he would in all probability have won

the latter ; for the defendant was very confident that the document was favorable until the adversary's argument of the general proposition that the verdict was contrary to the evidence changed his mind. He then set to work and looked up other proof, by means of which he finally prevailed in both cases.

§ 274. For all cases closely related to one another, as explained above, there should be careful forecast in the plan of conduct. It will nearly always help you to have the selection of the one to be tried first. And the use of the trial to make discoveries of fact and the views of the adversary, to divert attention from defenceless points, to sound the judge, to steal a march and achieve the first success, should be well premeditated. Means of postponing the other cases may be found. The counsel engaged should be carefully studied. The one leading on the opposite side of the preferred case may not be in the others, and he may press for immediate trial and have such force of character as to effect an acquiescence in his desires. Or your wish, if its real reason be cleverly concealed, may be attained by the consent of your adversaries.

The subject is too much neglected by all but the most thorough practitioners. Many times the average lawyer is not aware of the bearing which one of his cases has upon another until he has blundered into a premature show of his hand or made his attack in the wrong place, after which he sees that, had he tried the other first, he would have gained both or lost but one. It is not enough that each case be well understood. The need is that every member of the group be studied in its relations to its companions of witnesses and other evidence, of legal positions, of peculiar strength or weakness, as for instance in respect

of the character of the parties, of counsel, and of many other things which will suggest themselves to the practitioner whose eyes have been opened to the importance of this matter.

§ 275. Closely akin to the last subdivision is the securing of all possible alliances for your client. Other people may be similarly interested while they are not parties. Their co-operation will often help greatly, revealing new facts, adding influence, and softening opposition. Sometimes their interest had better be kept secret until you have won a decided success, and again it may be well to proclaim it early. It now and then occurs, that after litigation passes a certain point there is a divergence of the interest which was united before. Here by a communication to your old enemies, demonstrating their present community of interest with you, you may propose such wise conjoint action as will turn them into the best troops of your side.

Reflect and look about, and you will soon find in your own practice many illustrations of what we have said in this section.

§ 276. One of the last things in the plan to be matured is the settlement of what we may term the order of trial; that is, the arrangement of your law points and the marshalling of your proofs. The former may be dismissed with this mere allusion. The other demands a short comment. We will begin by illustration from a blunder. A prisoner was put on trial for murder. The killing had occurred in the midst of a large collection of people, nearly all of whom were hostile to the slayer; but as it was sudden and attended with great excitement there was but one of the bystanders not related to him who could prove that he gave the fatal stroke. The defence was that he was

protecting the life of his infirm father. If the defendant introduced no evidence, he would have the last word to the jury. The counsel for the State, who unduly desired this privilege for himself, ordered his proofs with a view to force the defendant to introduce evidence. He proved the killing only, and, relying upon the presumption of malice therefrom, he rested. The father then testified that, while he was unarmed, the deceased renewed a former quarrel with him, tried many ways in vain to provoke a blow, and at last commenced an assault. The witness struck back in self-defence. The deceased began to use his knife. Some of the friends of the latter struck the old man from the other side. One of his sons came up, but he was prostrated by a cudgel. While the father guarded against the gleaming blade in front and was under a rain of blows from behind, the other son, the defendant, rushed into the fray, killing the deceased after a brief encounter and then instantly turning his bloody knife upon the other combatant, who was still beating his father. It thus appeared that the son's sole object was the deliverance of the father from his extreme peril. The old man passed a long cross-examination without damage, and the effect of his testimony, in spite of his relationship and unpopularity, was very great, as it seemed to raise the curtain which the State wanted to keep down and explain the motive of the act. The State replied with voluminous and apparently credible evidence contradicting that of the father, but she could not displace its deep lodgment.

§ 277. Had the counsel for the State introduced at the first much of that which he had reserved for rebuttal, he could have given to his theory of the killing the telling support of the first impression upon the minds of the jury.

But he well knew the defence relied upon, as the father had made a statement under the statute when he was previously tried on the same indictment and acquitted, and he knew further that nearly any particular one of the bystanders would testify to at least a minute fact in some wise verifying the narrative of the father. This made him fear that, if he undertook to go beyond the mere killing, the prisoner would draw out in cross-examination sufficient to justify him in dispensing with evidence for himself.

§ 278. We may say that, if your case for the plaintiff is doubtful, you should premeditate resting only upon as strong proof as you can make. And this is almost universally the right policy in criminal prosecutions. But where much of your evidence for the plaintiff is self-contradictory or open to other serious attack, it may be expedient to ascertain the evidence on which the defendant will rely in time for you to cull from your own that which serves to overbear your antagonist without hurting you. Some efficient lawyers, who are generally as strong on one side as on the other of any particular kind of case, seem to do all of their premeditation after they have announced ready. They show a wonderful quickness and ingenuity which are often overprized. If you note them closely, you find that they frequently lose for the lack of something which a little forethought would have supplied, and further that they hardly ever thoroughly try a case until by chance they have opportunity to try it the second time. The young lawyer should teach himself to arrange beforehand all of his positions as to decisive points of law and evidence. He must not try to predict the minutiae of the adverse case nor all of even his own. While he prepares for that

which can be almost unerringly predicted, he must also cultivate the *ex tempore* readiness a high degree of which is always found as a characteristic of the successful trial counsel. A definite direction and a general outline are all that should be included in the plan. If this is done with prudence and practical insight, and if experience has developed self-reliance and inventiveness, the lesser operations will in the main be conducted aright.

§ 279. The plaintiff, or the party maintaining the affirmative of the issue, usually has the right to begin. The defendant may sometimes acquire it by confession and justification. Again, where one has the initiative, he may be deprived of having the last word to the jury by the failure of the other side to introduce evidence. We note that many lawyers take pains to secure both the right to begin and the general reply. I think that usually in practice the value of the first impression upon the court with evidence *prima facie* satisfactory is underrated, while the value of the conclusion in the argument is overrated. Both advantages are to be sought after. But either one can be bought too dear. A defendant at law may turn himself into a plaintiff in equity by a bill giving his adversary advantages that he did not have before, and it is a common observation that the concluding argument to the jury is often obtained by a fatal sacrifice of evidence.

§ 280. We insist that the plan be clearly grasped and fixed in the understanding. Nothing conduces so much to this end — especially in complicated cases — as that it be neatly drafted. That may largely be done in the arrangement of your proposed proofs.

§ 281. In conclusion of what we say of the essentials, we urge that, though this is a long chapter, its length is

not sufficient even in this small work to represent the relative importance of its subject. The essence of our lawyer is in how he fashions, anticipates, and contrives as to the points on which the event will turn; the unerring judgment of his adoption or rejection of materials belonging to every one of the three elements, or of means that are proposed; the consolidation of his proofs in strongest array; his happy provision against the as yet unpublished counter preparation; the exquisite tact by which he covers the vulnerable parts of his evidence and commands those of the opposite, keeps back unfavorable and brings out favorable law questions, and steers clear of the shoals of obloquy into which he draws his adversary; his Napoleonic audacity in rightly aiming his attack upon seemingly impregnable positions, — yes, this is the true sphere and arena of the trial practitioner. A right plan of conduct is the eye to preparation, to the opening of the case, superintendence of the evidence, argument, and gathering the fruits of victory. During the time of the classical Roman law the jurisconsult — that is, the case-answerer — was highly exalted above the forensic orator. And we have reached a time when the lawyer who is very able in plan of conduct far excels in sway of business and standing at the bar the mere advocate, however much honey he may let flow from his tongue.

§ 282. We will now treat somewhat at random of some other topics which we are in doubt whether to place in this chapter or in those immediately preceding.

§ 283. Sometimes you can help your case by procuring special legislation for it in matters not hampered by the Federal or State Constitution. Thus the legislature may remit a forfeiture to the State before the right of some

person to it has vested by reason of a judgment rendered in his favor.

§ 284. There are many controversies which you had better dispose of, if you can, by an arbitration or reference. It is generally a prudent rule to arbitrate bad cases and decline to arbitrate good ones. Arbitrators, both professional and lay, are over-prone to compromise; and if the right is manifestly against you, still you will nearly always be awarded something in an arbitration. But it has been my observation that the poor, the weak, the infirm, the widow, and the orphan, succeed better in their cases when the whole country can note the trial from beginning to end. To leave the case of an inexperienced man of submissive disposition who is matched with a shrewd adversary to the decision of laymen, is generally to make the strong man stronger and the weak one weaker. Yet there are cases involving the most delicate matters which should never be publicly investigated if it can be avoided. The whole community would be scandalized at the consequent exposures. When the honor, the happiness, or the domestic peace of your client is at stake, you must govern him with a high hand. His property and the amount of your fee should be postponed to the more precious interests.

§ 285. Here is our opportunity for recommending amicable settlements. Let it be your always kept rule, except in those cases where delay is perilous, never to bring an action or file a defence until you have been refused a composition that you regard reasonable and right. Ask the other side to confer with you; solicit an offer; be ready to offer terms yourself. Always get from your client as large discretion as possible. The disease of our judiciary is slowness. The parties grow old in litigation: witnesses

die ; the death of a party often entails inextricable confusion ; and there is still more where a counsel who is the sole repository of the secrets of a long preparation falls in the harness. It is better for the court always crowded with business, better for the parties who have other affairs claiming attention, better for the lawyers, better for society, that there be as speedy settlement as possible of all cases that can be settled. Remember the almost unconscionable sacrifices which a shrewd business man will often make in order to avoid the courts. I lean decidedly against arbitration in general. References to the counsel of the parties are better, but there is in them also too much compromise of certain rights. An informal settlement with your adversary's lawyer is preferable. If you can meet each other as gentlemen, and not as sharpers, intending to effect a settlement which shall be on the whole just and fair, you will often be astonished to find how you can satisfy yourselves and rejoice your clients. The celebrated lawyer whom I commended above,¹ habitually made more effort to settle cases than any of his contemporaries. If you were on the other side and believed to be favorably inclined, he would sound you as soon as he fell in with you ; and if he found the way clear, he would disclose his hand with great frankness. Then he would consider what you had to say. After brief reflection he would begin, "Well, this is the right of the case," and he would proceed to state what he conceived it to be. He always conceded you something for the sake of peace, as he would say. With this frankness and earnest desire to end at once all strife that he could, he amicably disposed of an amazing amount of litigation. He made a large fortune in the practice ;

¹ § 78.

and I often thought that the greater part of it was the accumulation of fees which he had received in such cases. Nothing could exceed his candor both to his adversary and to his own client. To the latter he would say, when canvassing a proposed settlement: "Possibly I might be able to recover a better verdict for you; but then the chances of doing worse are so and so. Your time and your peace are worth more than this probable concession. I advise you to settle as is proposed; but I tell you that you command me while I can only recommend to you." The client generally heard this little harangue with weariness, and before it was half done had given him full powers. He who rejected his proposals nearly always had reason afterwards to repent, for it was but seldom in such a case that he failed to recover more than he had offered to be content with.

§ 286. The lawyer should ever be vigilant to discover chances of compromising controversies. Let him guard himself against a disposition to concede too much, and he should not make of himself a stickler for small things. Let him confer only with the counsel of the other side. Never take advantage of a layman. Seek a foeman worthy of your steel in his lawyer. To procure an inadequate settlement of a litigated matter from a party without the knowledge of his lawyer ought to be made a penal offence. When negotiating, you are to be prudent and careful, for you must not disclose secrets to your hurt. And that which is of the greatest importance is that you shall understand the character of your adversary. If he is tricky or unreasonably contentious, you had better do nothing more than make him a definite offer, and inquire for his in the event that he rejects yours. But if he is one of those gentlemen

who fill the bar of America everywhere, when you divine that he cannot meet or evade your strength, you may disclose it, and thereby the more speedily effect your purpose. It has been my experience to find that in treaties with counsel for amicable settlements there are less diplomacy and less strife to outwit than in any other attempts at adjustment.

CHAPTER VI.

BRIEFS.

§ 287. AFTER some hesitation we have decided to devote a chapter to the subject of Briefs. Were we writing for the English public we should give it only a paragraph, inserted in some fit digression above. The quotation from Sellon made hereinafter would constitute the bulk of what we should have said. That the importance of a brief for the proper preparation of a case for trial at *nisi prius* is so great, and is so little understood in this country, is the reason justifying this chapter.

§ 288. The word in the comprehensive sense which prevails in England is hardly ever used in America. Here the lawyer generally calls the skeleton of his law argument his brief. In many parts of the country you never see him provided with any notes except when he argues a purely legal question, and even then you will seldom see him furnished with what he calls a brief, unless he is before the court of last resort. You are inclined to believe that, did not the rules require him to furnish the court with his points and authorities, he would there trust to his unaided memory in making his argument.

§ 289. In England the brief is prepared by the attorney for the use of the counsel who conduct the trial. The author just mentioned gives the following advice: "The

briefs should contain an abstract of the pleadings, a clear statement of the client's case, and a proper arrangement of the proofs, with the names of the witnesses. The grand rule to be observed in the drawing of briefs is conciseness with perspicuity."¹ Another author of high authority, citing and approving the passage just quoted, says: "Previously to the trial a *brief* should be prepared by the attorney for each party and delivered to counsel, containing a copy or full abstract of the pleadings, a clear statement of the facts of the case, with such observations as occur thereon, and a proper arrangement of the proofs, with the names of the witnesses. The great rule to be observed in drawing briefs, as is well expressed in a late useful publication, consists in conciseness with perspicuity."²

§ 290. The reader thus sees that a brief prepared by an English attorney is much more than a mere enumeration of points and authorities. It may not contain a single one of these and yet be voluminous. It is such a statement as that the case may be therefrom understood and conducted. To define it by its essence, it sets forth in an orderly method the whole results of the preparation of the case.

§ 291. Surely it is not needed that we pause here and demonstrate the good policy of making a brief in the English sense for every case. The merchant enters all his transactions as they occur in his day-book, and at last they are transferred to the ledger, where they are sorted and digested. The lawyer himself keeps his books, in which he can always find a lucid record of any affair between himself and his client or partner. The most ready advocates premeditate what they will say, and if

¹ 2 Sellen Pr. 459.

² Tidd Pr. 799.

they do not hold their notes before them while they are speaking they yet have the substance of their speeches well conned and by heart. Shall the lawyer, who is a licensed irregular, who has no appointed times of his own, who is in his office at his hasty preparation to-day and a hundred miles away attending a distant court to-morrow, — shall he who, as fast as he loads his memory afresh, has the contents at once thrust out by others, trust to that battered and ill-treated memory to carry the pleadings, the evidence, the anticipations of the adversary's case and the plan of conduct, without giving it artificial aid? Could he remember as Niebuhr did, he might dispense with memoranda. Lieber, in his reminiscences of the historian, who, be it understood, had never visited Greece, says: —

“When I had just returned from Greece and described certain spots to him, he would ask for by-ways, remains of wells, paths over ridges, or other minute details, as if he had been there. As many of the objects for which he asked exist still and I had seen them, I was amazed at his accurate knowledge. ‘O,’ said he, ‘I never forget anything I have once seen, read, or heard.’”

Is there an American lawyer who has such a memory? If there is, we concede that he can manage even his intricate cases without a brief.

§ 292. If you have done as we desire you to do in your preparation, you have kept *memoranda* of everything. You have jotted down the controlling legal positions and the supporting authorities. You have notes of your evidence and also of that which you anticipate that the adversary will bring forward. When you see that the close of the preparation is at hand, you should make up your brief, which is the final digest of the preparation. If it is

well made, another lawyer could, after giving it a short study, try the case almost as well as you.

§ 293. To do this important work well requires much ability. Mr. Warren, addressing himself to English attorneys and solicitors, expresses himself thus: "I cannot quit this part of the subject without suggesting the propriety of making *logic* one of the early studies of those preparing for your branch of the profession. Only consider how necessary it is to have some acquaintance with it in order to be able to deal successfully with such cases as I have just been speaking of [patent and copyright cases], — nay, to deal with any — with all — cases requiring clear and methodical treatment by you in order to set them in proper order and in a right direction for legal adjudication. How charming is it to the finest intellect to have to deal with a brief, however ponderous and disheartening in bulk and appearance, which on being opened displays the possession on the part of the attorney or solicitor who drew it up of those qualifications which I am now urging on you: the language elegant, simple, and nervous; disfigured by no senseless repetitions, no vulgar colloquialisms, by nothing impertinent or intemperate; and *lucidus ordo* shining in every page. How much of the triumph achieved by the most eminent counsel is not really shared by the framer of such a brief as I am speaking of? and who could not have been surpassed even if that very counsel had sat down himself to draw up the brief from which he was to speak."¹

§ 294. A brief is to be made up gradually. The materials may be long collecting and arranging. Many lawyers enter their authorities in a blank-book under the name of

¹ Duties of Attorneys and Solicitors, Am. ed. 66.

the case, but you will find it more convenient to have them on loose paper, to be transferred to your press-book when they have been finally sifted and sorted. In fact all of your notes — those of the evidence as well as of law — should be made on loose paper. Never write on but one side of the paper. Your paper-knife and mucilage bottle will save you or your clerk a world of tiresome transcription if your notes are not written upon both sides, for you can then tear out and insert as you please in any particular page without destroying anything on the opposite page.

§ 295. We will give a pertinent passage from Mr. Bishop: — “There are things which must be taken down for future use. They do not so much occur when one is engaged in the study of the law, as when afterwards he enters upon its practice. If, for example, a brief is to be made out in a cause which is to be argued on a question of law before the court, the person making the brief needs to note down the authorities as he finds them. Then he collects his points and writes them down, points and authorities together. In like manner, if a lawyer is looking up a question on which to advise a client, he should make such references as will enable him if litigation is afterwards carried on to go on with the case without a fresh search into the books for what is already found. This is a labor-saving expedient.”¹ And in a subsequent place he shows the convenience of having the notes on separate slips, each one being labelled with its proper name.²

It is worthy of observation that the distinguished author, in the excerpt given, falls into the American habit of restricting a brief in meaning to the scheme of a law argument. It must be remembered that the lawyer has

¹ First Book, § 423.

² Ibid., § 426.

need for a proper system of making and preserving notes of every item of his preparation. In another place, referred to in the foot-note, we have been at pains to show what is this proper system.¹

§ 296. But now let us go somewhat into systematic detail. And, first, the English authorities agree that the brief should contain a copy of the pleadings, or, to use the words of Tidd given above, "a full abstract." Some contend that there should always be copies. This will probably be preferred in England where the briefs are not prepared by the counsel. Thus Choate is represented as insisting that a person who was to report the testimony in a certain case should set down everything just as it fell from the lips of each witness. Of course Choate would put his own meaning on the evidence, and that meaning might be very small as compared with the volume of the report. An English counsel would likewise prefer to abridge the pleadings for himself. But what is the better for American counsel, who make their briefs themselves? As the form of pleading becomes year by year of less importance, it seems unnecessary to give more than enough of the substance to understand definitely the issue. Suppose that there is a suit upon a promissory note and the defendant has pleaded *non est factum*. A short abstract or a copy of the note, as the cause of action, and a note of the defence by name, states the pleadings with sufficient accuracy. And this statement is neater than a copy of the declaration and plea, and it is more saving of time to yourself, or to your associate who may have to learn the case from you. But there are many cases where the issues cannot be stated so shortly. Here the pleadings must be meditated carefully so that the

¹ American Law Studies, §§ 228-234.

abstract fully present their substance. A lucid abridgment gives you a firmer grasp and enables you to bring the court to a more speedy understanding of the case. Of course this work must be correctly done. All of the genuine success of the lawyer — his most brilliant achievements of professional skill and his greatest feats of eloquence — are founded upon the utmost accuracy of knowledge of details. You should consider your abridgment of the pleadings until you feel sure that it is complete and faithful. To give the substance of voluminous and ill-arranged matter in the true natural order is a great talent. For instance, how often do we find that a head-note is mistaken in some respect! A copyist exercises only his eyes, but one who accurately compresses a diffused and disjointed mass into its smallest intelligible statement has one of the highest talents of the lawyer.

We suggest that you attach to your brief copies of complicated pleadings, so that opportunity be always afforded you or your associate to decide if your presentation is reliable and to correct any of its faults.

§ 297. Next there must be a statement of the case of the client and that of the adversary as anticipated, this statement including material points both of fact and law. It should be like that of the pleadings just recommended, as condensed as is compatible with clearness. The fault most common here is that the feelings of the advocate unconsciously mislead him. A real lawyer soon learns to suspect that every narrative of a client is a misrepresentation in some particulars. Self-interest excites with a desire to paint the case better than the reality. Parties seem often to believe that by doing this they improve their cases. And many lawyers are similarly affected. Even when one

is consulting his brethren in the free intercourse which characterizes the bar, it is not always that you hear him put his case exactly. Some detail, slight it may be, or some coloring, is added or omitted. A lawyer had better by far learn habitually to overstate his own weakness and the case of his adversary, and tax himself with the additional inventiveness necessary to meet the imaginary dangers, than cultivate a disposition to sleep in a false security. It is therefore to be emphasized that the statement be fair.

The additions which Scarlet made to the brief of the attorney are to be borne in mind. He tells us in his Autobiography:—

“The mode which I adopted to obtain the facts was to interrogate the attorney when he came with his brief what was the fact in his own case on which he mainly relied. Next, what he supposed his adversary’s case to depend upon. Having made a short note of his statement on the back of the brief, I proceeded to discuss the appeal without further instruction or meditation. . . .

“In like manner, when I began to lead causes in the superior courts, it was my practice to inquire of my junior counsel what were the points on both sides, and to make a minute of those on the back of the brief.”¹

§ 298. We intend more than the statement of the English attorney upon which the case is answered by counsel. What we mean is a presentation of the leading propositions of your side, those of the other as far as you can divine them, and the way in which you seek to avoid the latter. By means of this the trial can be fitly managed and the argument rightly made. Of course it is apparent

¹ Memoir of Lord Abinger, 61, 62. See American Law Studies, § 773, for a fuller citation.

that in its final form the statement we insist upon is one of the very last insertions to be made in the brief.

§ 299. The English authorities say that the brief should contain the proofs marshalled and a list of the witnesses. We agree to this, and we suggest that there should be added a list of the expected witnesses and proofs of the other side.

The list of your witnesses is important. How often have all of us been wearied by waiting in court for some counsel to find out who are his witnesses before he can have them called! But besides the convenience and economy of preserving the names, there results to you a still greater advantage from keeping these lists. Whenever you open the papers to add somewhat, be it ever so little, your eyes catch these names, — both those of your own and of the adverse witnesses. They are imprinted on your memory, and as you go about following up the many calls which disperse your efforts through a large society, there is no estimating the additional testimony that you will get for your client, and the crippling and checking that you will work to the adversary. A lawyer must always carry his cases in mind, and especially should his recollection of the evidence be full and ready.

§ 300. Special attention must be given to the documentary proofs. The same arguments made above in favor of making abstracts of pleadings apply here. Even if the lawyer hires copies to be taken, he had better form the habit of adding a short abstract. When his cause is at last reached after it may be some years of the "law's delay," with his head full of a multiplicity of other affairs, he will not regret that he has so compressed the volume of the testimony that he can gather it all up at once.

When the document is of unusual character, as for instance a deed containing a condition, and when the issue is on the condition, the abstract should be followed by a note of your conception of its legal force and effect. This will let your associate into your views at once, and he may give you valuable corrections or additions.

§ 301. You often see the plaintiff nonsuited or a verdict returned against the defendant because of a neglect to bring in evidence the existence of which is apparent. The lawyer who is in the habit of putting on paper the proofs necessary to uphold the allegations of his pleadings rarely makes the mistakes just mentioned. He can in no other way so surely come to the trial with complete proofs.

§ 302. There are some other matters to be thought of. You may anticipate collateral questions. Thus you may be met with serious objection to some of your offered evidence. Whenever you can anticipate such objection your answer to it should be noted at the proper place in your brief. And you should prepare objections to what you anticipate will be the proof of the other side.

§ 303. Cautions to yourself and associate are sometimes proper. Thus Mr. Warren, in the work from which we take so much in this chapter, advises the attorney when the fact authorizes it to make some such memorandum in his brief opposite to the proof as the following: "This witness is exceedingly eager and zealous, and will be required to be held with a tight rein." Addressing the attorney in another passage, he says: "Be sure to apprise counsel in your briefs of every blot which you think it probable that your opponent may be able to detect in the character of your witnesses. This is a matter of great consequence."

§ 304. These hasty words are only suggestive. The

lawyer can add to them in any particular case by asking himself and answering the question, "What material particular of my knowledge of the facts, or my preparation, does the brief fail to show?"

When a brief, thoroughly and in a right arrangement, contains every item of such knowledge and preparation, it is perfect.

§ 305. As we have hinted above, there should be a neat draft of the plan of conduct. Coinciding so nearly as it does with the statement of the case which we have explained in this chapter, it is the key to all the rest.

§ 306. Lastly, if the brief is voluminous, it should be indexed. The use and economy of the index are so apparent that we will say nothing more of the matter.

§ 307. I now subjoin a passage of considerable length from Mr. Warren. My own differences from his positions have been already intimated. The reader is reminded that he is addressing attorneys and solicitors, who in England never act as counsel.

§ 308. "Give the pleadings at length; not contenting yourself with merely indicating their substance and effect. A sheet or two spared by these means is no compensation for the serious inconvenience and dangers often attending it. Counsel may be much misled by your so doing. The cause often depends upon the very words in which the pleadings are couched, and on which critical issues have been taken. I saw not long ago, for instance, a plaintiff's counsel about to submit to his adversary, owing to the attorney of the former having misled him as to the real nature of the pleadings. He had said as to the only special plea, 'The replication denies the agreement,' which was proved as alleged in the plea; but the judge pointed

out that the plaintiff stood much more favorably on the record, — his replication being *de injuria*, — which put in issue *every* traversable fact alleged in the plea. Now, why could not the replication have been set forth fully and correctly in the brief?

§ 309. “Never let a brief go into counsel’s hands with blanks on it for names, dates, or sums of money. It not only has a very slovenly, unbusiness-like appearance, but often greatly embarrasses counsel, who may not have you at their elbow to supply them with the necessary information. No brief should be regarded by you as complete till you shall have carefully gone over it and filled up every blank ; or if that be for any sufficient reason impracticable before delivering the brief, take care to say as much on the margin.

§ 310. “When there are two or more briefs, and especially if they be of length, or intricate in detail, or refer to many documents, use your utmost efforts to have the pages of all the briefs numbered *alike*, so that any one counsel, having found what is required during the progress of the cause, may in an instant place his companions in the same situation. Your law stationer is surely bound to obey your orders in this respect. I have heard a neglect of this matter often loudly complained of, and with justice, as both inconvenient and irritating on sudden exigencies.¹

§ 311. “In cases of a little more difficulty or importance than usual, you may greatly facilitate the labors of

¹ If the briefs are printed, or if the copies are made by the multiplying mechanical processes lately come into vogue, such as by the use of pads or manifold paper, the pages of all will be alike. But if each copy is to be made by hand, it is well to divide the original into short sections and number them consecutively, for if the copies are accurate the sections of all will correspond though the pages differ.

counsel and enable them readily to do their duty by prefixing to the brief a neat analysis of the case, of both pleadings and facts, referring to the different pages in the brief where they will be found; and above all giving an alphabetical index of the names of the witnesses and the pages where their proofs are placed.

§ 312. "If you have obtained what you may deem an able opinion upon the case, or even upon the evidence necessary to support it, copy that opinion in your brief for the guidance of counsel at the trial: whom it may quickly put in possession of the true bearings of the cause and apprise them of its difficulties, timely enabling them better to deal with them. The most eminent leading counsel by no means regard such assistance as superfluous, but on the contrary welcome it. More than once have I seen them, when a cause was called on before they had had time to read their briefs, as it were devour the 'opinion' written by some able and experienced junior, and rise soon afterwards wonderfully possessed of the case, especially when engaged for the defendant.

§ 313. "Whenever your case involves localities let me entreat you to take the trouble of giving a faithful sketch of the *locus in quo* on one of the pages of your brief or on a separate paper. A single glance at a spirited and *faithful* sketch of the scene of action will be worth half a dozen consultations. It will fix the matter firmly in your counsel's mind and prevent him from either being confused himself or suffering the witnesses, judge, or jury to be confused. Take care also to have several copies in readiness (being able to prove their accuracy) to lay before the jury while counsel is addressing them,—a matter that of no slight importance to your client's interests. A good *model*

of premises or machinery is of incalculable service in giving counsel, and enabling them to give others, a clear view of the case which it illustrates. During last Easter Term the Court of Common Pleas was occupied for an entire day with a troublesome motion for a new trial in a patent case. There was no model to illustrate the statements of counsel or the evidence of witnesses. The judges found it almost impossible to deal satisfactorily with the case ; and at the close of the day, one of them (Mr. Justice Maule), as the court rose, observed : ‘ In the absence of a model the evidence might really all have been *read the wrong way*.’

§ 314. “ Take special care, however, that your plan or model be fair, — perfectly faithful, — made by a disinterested person, with no instructions whatever but to prepare an impartial and accurate representation of the reality ; one which will be acquiesced in by the opposite side and by the witnesses. This will obtain for you credit, with both the judge and jury, for the fair and candid spirit in which you have brought forward your case ; and that credit may serve to turn the scale in your favor in a question of doubt and difficulty. An opposite course of conduct is almost certain to prejudice you in professional and public estimation, and throw discredit on your client and his case, seriously endangering one otherwise characterized by *bona fides*.”¹

§ 315. Of course if there are important questions of law in the case, a part of the brief should be devoted to them. For matters easily disposed of, a mere note of a statute, or a late State or Federal decision, or some reliable text-book, may suffice. But where a lengthy examination of statutory clauses and decisions is necessary in order to educe the law

¹ Duties of Attorneys, etc., 178 *et seq.*

with accuracy, you should briefly indicate the substance of the clauses, and the pith of the rulings, and the facts to which they were applied. You will rejoice that you took this extra pains when you come to try your case a long while after the brief was made. If you have contented yourself with mere citations it may require more effort to revive the argument than you can well spare in your limited time.

§ 316. One only needs to consult the rules of practice in the different States, and hear the almost universal American use of the word "brief" in the restricted sense of a skeleton of legal positions with relevant authorities, mentioned above, in order to see how widely we differ in the estimate of briefs from the English. The grade of attorneys and solicitors never was separate here from that of counsel. Every practitioner perhaps was ambitious, and arrogated to himself the superior rank. In the mother country it was the duty of attorneys to prepare briefs, but as he was no attorney he would not do the degrading work. Thus briefs seem never to have been introduced into general use in America. That counsel here have direct contact with witnesses and party, and are all the while personally cognizant of every detail of their cases, not learning them at second hand, is to my mind an almost incalculable superiority of the American over the English system. But we have not improved our system into what it should be. Our counsel should not alone get up a case better than the English attorneys, but they should also draw better briefs. The practice of law without briefs is as slovenly and primitive as the score kept with chalk-marks. Do but note one of our brethren who goes on in this slipshod manner. He becomes a nuisance by keeping in his possession original

papers which should never leave the clerk's office. He never recollects exactly the contents of documentary evidence, and he often forgets the very authorities on which his case depends. This is all wrong. It is wasteful of time. It is criminal negligence of the client's cause intrusted. The practitioner should always be able in his office, without any assistance except his brief or the memoranda which he has taken, each at its appropriate step in the preparation, to give a clear statement of the case. One who has never tried this careful preparation cannot understand how the making of a sufficient brief facilitates the conquest of the case. This advantage alone is more than compensation for the labor. No attack or defence can be too well meditated or understood, nor can the operations of the other side be too well conjectured. And it is just as hard accurately to shape the conduct of an intricate case and hold its preparation in your head without a brief or memoranda answering to it, as it is to compose and get by heart a long speech without writing any of it. The feat has been accomplished. But we know that to write the speech and afterwards learn it is the quicker and better way.

§ 317. All the papers belonging to a particular case should always be kept together. It is no task to keep them in proper order. First the pleadings, — copies or abstracts. Next, the memoranda of the expected testimony, oral or written, of your side and of the other. These to be accompanied by copies of documents, depositions, and all such matters. Then your notes of agenda. Your authorities may find place afterwards. Towards the close of the preparation you can intercalate the final statement of the case and add the last draft of the plan of conduct. And

so your brief is complete. You have not missed the time spent in its making. If the cause is difficult and involved, when you recollect the many times you have referred to this collection, and that it has easily kept you up with all the necessities of preparation, you wonder how you could have done without it. It may look cumbrous and unwieldy, but to you it is systematic and lucid. You had better not attach the papers together, for if you do not they can be added to or replaced *ad libitum* in your office, or a particular one, say the citations or the list of witnesses, can be used separately in court and with more convenience.

There is no Procrustean model of briefs. They vary with the cases. A particular one should be the accurate miniature of its case. If the case is simple, the brief will be simple; if it is complex, all its elements appearing in the brief will make it complex too.

§ 318. I have to add a last caution, and then I have done with the subject of this chapter. You are not to cultivate a slavish dependence on your brief as the repository of your preparation and the record of your anticipations and premeditated plan of conduct. You anticipate and provide for as much as you can in order to have larger supplies out of which to meet on the sudden every exigency. The ground and possibly the dispositions of his enemy are known to the general before the battle begins. But he does not essay to fight a set battle any more than the lawyer, for all of his forecast, anticipates a set trial. Neither will be surprised by any action of the other side, however unexpected. The plan of contest of each is not rigid, but is pliant and responsive to even unforeseen needs. The most happy extemporaneous efforts of speech or action are made by men who have the whole business as it were by heart. Observe an old lawyer who comes to argue a

law point. Possibly he has the scheme of what he would say upon paper. A question from the judge presents a new view. The lawyer abandons his prepared argument and speaks only to the suggestions that fall from the bench. And he often triumphantly sustains his case. Why can he do this? Because he is thorough master of the subject, and being that he can effectively handle it from any standpoint. And so the practitioner should always be on the eve of trial. His brief, containing a year's assiduous preparation, it may be, will often be abandoned when he is in the midst of the exciting encounter. There have been developments which he did not anticipate, and the entire phase of the case seems changed. But with his skilful preparation he has come not only armed to meet what is anticipated, but armed too for that which is not. If you have never looked into the case till the night before the trial, and you then win it by an unexpected feat after a scaring menace of disaster, you are proud. Your ingenuity enraptures you, and you feel that you are a great man. Out of what was that stroke made which laid the adversary low? It was aimed from a knowledge that you had acquired in only a few hours. Perhaps had you come carefully prepared there never would have been that dark hour which threatened you. You might have foreseen and provided against it, or perhaps you might have planned and executed a much more brilliant victory. It stands to reason that you should be more full of resources in a case which you have studied long and well, than in one to which you have given only a few hours' attention.

Your preparation and your brief are not for a pre-established conduct of the case only. They are a training to do your utmost and best wherever and whenever fortune may dictate that you make trial of the adversary.

2

BOOK II.

CONDUCT IN COURT.

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CHAPTER VII.

INTRODUCTORY.

§ 319. WE have frequently illustrated our subject from the correspondences of the military art, and, as we have said, we are half inclined to entitle this Book "The Tactics of Litigation." In war, after the campaign has been planned and the army gathered upon the decisive point according to the manual of strategy, the engagement itself must be fought according to another manual. The former concentrates the greatest possible force on the field, while the latter obtains from the force its greatest possible achievement in battle. And thus in litigation, after a careful preparation has brought the parties to prove the fortunes of a trial, the trial is to be conducted according to other principles than those of preparation.

§ 320. Conduct in Court, as we name the subject of this book, is generally called Advocacy. It is the art of having all of your resources to count their greatest in the forensic contention, and of impairing as much as you can those of the adversary. To authors and to the multitude it has long displaced the more important division of preparation, and they deem it the only essential. Excellence in

advocacy is conspicuous and the crown of success brilliant, for the effort is in public, where many usually see and comprehend, while on the other hand the most superb preparation will be understood by only the lawyers engaged. A showy counsel who is the attraction of all eyes and ears in the court-room is often but the mouth-piece, and an inefficient one at that, of some hard-working and cool-headed associate who has industriously collected and skilfully grouped the materials of his side and has with the divination of genius foreseen the adversary's line of operations and provided against it. And yet to manage a trial ably from beginning to end often requires a high degree of special talent. In the office and consultation-room there is opportunity of procrastination and review, but in court the counsel leading must in many straits reach his conclusions by a flash and then act upon them as confidently and surely as if he had been thinking them over for weeks. To open in the beginning the ear of the court and jury to yourself and to close it to your antagonist; to know when you have done with your witness; to detect at once the hidden inconsistency of the hostile witness with stronger evidence, or his self-contradiction, and decide well whether to leave him as he is for the argument or take the risk of his escape from the toils if he is pressed further in cross-examination; to grasp thoroughly at all times the entire case made by the other side; to feel surely, as it were, the leaning of the judge, and to lead him if it is adverse upon other ground or to confirm him if it is favorable; to read every meaning look of counsel, party, witness, juror, or court; to remember and forget wisely through the entire course of the evidence and argument;—these are the daily achievements of the ready lawyer.

§ 321. And it is rare that the talent to prepare a case and the talent to manage it in court are united each in its highest form. Often both talents are possessed by the same man, though one is generally in decided excess of the other. Thus Napoleon was not deemed the match of Moreau, one of his marshals, in tactics, while he was infinitely superior in strategy and general military ability. There are commanders and lawyers who always have everything important cut and dried, and they thereby win a large proportion of battles and cases. Yet many of them are not perfect in their art, for they are unduly disconcerted by unexpected occurrences. In contrast, there are generals who never evince any force of character until they are surprised by the appearance of the foe, when they triumph by seducing fortune ; and there is a class of ready and shrewd advocates who defer all serious exertion until the critical moment, and yet their general success is wonderful.

§ 322. When the average of cases is considered, it is found that each party approaches the trial with considerable knowledge — to borrow a term from card-playing — of the other's hand. There will be, however, a portion of each side unknown or not rightly understood, and many times the event will turn on the nature or the management of these unknown particulars. The prominent material points will hardly ever be overlooked, and they will be rightly attended to ; but the occurrences which cannot be predicted, such as the miscarriage of an important witness, a case made by the adversary utterly unanticipated in a cardinal particular, and which is the more perplexing because a different one has been prepared against, an amazing decision by the court, — these are the matters which peculiarly call for the tact of the efficient *nisi prius* lawyer.

The faculty now in contemplation is one of extemporaneous action, and it differs widely from that of a leisurely and well-premeditated preparation. The part played by this faculty in gaining success is greatly exaggerated. Still there is a considerable proportion of cases in which the result will nearly always be determined by the better court conduct. These are where the proofs of each side are pretty evenly balanced, or where the true law to be applied is doubtful, or where right on one side is matched with prejudice and a strong semblance of a claim on the other, or where the facts are novel and the true solution requires more thought and time than can be spared. This catalogue is not complete, but it serves to indicate sufficiently the general character of the litigation which specially demands all of the skill of the trial practitioner.

§ 323. The best management in court has been generally preceded by a particularly painstaking preparation. And such preparation is more important in the cases last enumerated than in all others. Argument is not necessary to prove the great superiority of the adversary who has acquired beforehand the more profound and accurate knowledge of the case to be tried. By reason of his better knowledge alone, other things being equal, he will often discomfit his opponent. Sometimes one will be vanquished where he is the stronger because he has not made the investigation which would have taught him his strength. But we do not say that the same man who has well done the precedent labor is surely the best man to direct the trial. The associate who has the highest degree of the extemporaneous faculty described should lead. And he should have thoroughly in his head and by heart the preparation of the case, by whomsoever that has been

made. The brief, if well digested and exhaustive, and if it is conscientiously studied, will qualify him for the delicate task. This antecedent preparation, the importance of which can never be overrated, as we are now about to use its results, it is well to analyze again in order to have it once more impressively contemplated. It consists in the main (1.) of a most industriously gathered and complete collection of all the materials of your own side; (2.) of such a collection, as far as has been possible, of those of the other side; (3.) of a proper classification of all these particulars so as to educe the issues and disclose the right modes of dealing with them; (4.) of a plan of conduct which has come out of the other three, — a plan which is firmly set upon incontrovertible facts and law, but which turns with elastic self-adjustability, to meet every unexpected move of the adversary.

§ 324. The subjects of the two Books run into one another, or rather the demarcation of conduct out of court from conduct in court is mainly made for the purpose of having the student to understand the whole of Conduct of Litigation. It is in the formation and the execution of the plan that the two cohere so closely that one is but the spontaneous continuation of the other. But the one is not the same as the other. Preparation is the fulcrum of attack or defence. But it must be nothing more. The good tactician is not tied to his preparation; which with him is only the right beginning, — the planting and fixing of the fulcrum immovably if he can, and the arraying of his columns in their best order, — but which others inferior often show by their acts that they conceive to be the end of their work. These drudges are never able to get beyond the brief, which they treat as a report of the trial

made beforehand. They will make out the case only *pro forma*.

§ 325. After the deal the game is to be played ; after the dispositions have been made, the battle is to be fought. To fight the battle of a case well, one must be master of the case. We say that an author is master of his subject when he maintains his ground against all opposers, each, it may be, attacking in a new and unexpected place. So likewise of a lawyer who, in trying his case, puts in the whole of his own material evidence and clips off every particle that he can of his adversary's which would damage, who from beginning to end foregoes no advantage, who objects and excepts in the right place and in the right way, and who when the jury retire cannot be said to have overlooked any fair opportunity of offence and protection, we may say that he has achieved a triumph ; for it is a triumph even if the adversary wins. In one of his maxims Napoleon says : "A general-in-chief should ask himself frequently in the day, 'What should I do if the enemy's army appeared now in my front, or on my right, or my left ?' If he have any difficulty in answering these questions, his position is bad, and he should seek to remedy it." And thus the intelligent lawyer has prepared for trial. He has not anticipated everything, — *all* the details, — for that is impossible ; but he has by repeated self-questionings at last so shaped and mobilized his case that he is ready for any turn during the trial.

§ 326. We may classify the leading objects of conduct in court as follows : —

1. Your own carefully prepared combinations are to be placed before the court in their best form.
2. You are to see that the adversary gets no advantage of law and evidence which he is not fairly entitled to.

3. You are to use efficiently, as the trial progresses, what further combinations you may be able to make *ex tempore* out of materials coming to hand.

It will serve to give a clearer idea of the distinction between the nature of preparation and that of the duties here in contemplation, to compare the work of the English attorneys and juniors of which the brief is the repository, and what the leader does with the case at *nisi prius*. The latter will concern himself with the preparation in order to reject useless parts and rectify mistakes in others so far as he can, but his principal business will be to encounter the adversary on the evidence and law, striving to attain the objects mentioned at the beginning of this section.

§ 327. There ought to be a consultation just before the trial, in which the line of conduct should be agreed upon, and who is to lead should be understood. The best counsel for each particular place should be assigned to it. One lawyer will examine the witnesses better than his associates: if so, the post should be given him, though he is not the leader. Sometimes an important legal argument at some point of the proceedings is foreseen: let it be settled who shall make it. Nothing is more irritating to the thorough lawyer than to see several counsel conducting a trial in no concert with one another, where no leadership is acknowledged and each one is trying to show off his superiority to all the rest. In England the established usage of the profession settles the question of leadership. Here the client can determine it; but it is generally decided by the spontaneous and tacit consent of the associates. The lawyer set up to lead should not be over-anxious to exhibit his authority and superior familiarity with and understanding of the case.

§ 328. At this consultation the witnesses and the party should be present if possible. Every important detail in the brief should be verified if true, or corrected if not. Especially should the witnesses be attended to. As they have been examined and re-examined before, they can soon be disposed of now. They should be searchingly probed on all material points.

The legal positions ought to be scanned with close scrutiny, and the pertinent authorities tested. In fact the entire case must be contemplated. There often occur changes and new developments to the very last. Let all such be looked at calmly and boldly, and the right remedy be found and applied.

It will be decided whether there shall be contention on the merits, or whether lighter legal force shall be resorted to. Often a well-taken exception will relieve you when you have reason to desire a continuance, but you have no good showing for it.

As we have said above, there are many simple issues which are easily come at and which do not require circumstance and parade. They will almost take care of themselves. Laborious examination before and careful preparation after acceptance, well-planned conduct and anxious consultations, are for those of intricacy and difficulty. While on the subject of consultations we may say that the associate counsel in all cases which need them, ought to confer with one another at every good opportunity during the trial.

§ 329. We will now say something of selecting the jury, a topic which brings us to the subject of the next chapter. We begin by giving a few cases.

A young man was charged with assault with intent to

murder. The prosecutor had been the tenant of his father ; and when the former was vacating, the son discovered that he was maliciously defacing the walls of one of the rooms. High words ensued, and then a fight. The prosecutor attacking with a heavy club was disabled by a well-aimed pistol-shot. All of the eyewitnesses were related to the prosecutor, and their testimony was expected to be very hostile to the defendant. His counsel had but a moment to study the panel, but he so managed his challenges that there were eleven landlords on the jury. According to the theory of the State the defendant was clearly guilty ; but the witnesses, having been ordered out of court, contradicted one another, and the defacement mentioned was shown by his admissions to have been the act of the tenant, although he had denied it on the stand. The predominant class upon the jury turned the scale in this doubtful case, and the defendant was acquitted. It was ascertained after the trial that the sons of several of the jury had had quarrels with their tenants for injuries done to the premises during their tenancies.

§ 330. A lawyer had spent several months of every year until after he had been called to the bar at the house of a relative, who lived in a distant part of the county, and he had thereby made many acquaintances among the neighbors. This lawyer, who had long resided elsewhere, was suddenly brought to this county to defend a stranger accused of murder upon what seemed to be convincing proof. He noted that those who lived in and near the county seat were strongly inclined against his client, while those beyond were neutral in opinion. The prosecution were not aware of the facts mentioned at the beginning of this section, and this gave the prisoner's counsel opportunity to

select seven of his old playmates for jurors. By an unexpected turn, a fact never disclosed before came out in the State's evidence which demonstrated the prisoner's innocence. But had not this occurred, the prisoner would still have had much advantage of the State because of the friends of his counsel on the jury.

§ 331. I once observed the trial of an action for libel against four defendants who had lately been excluded from the Baptist church on charges connected with the case. A large majority of the public sympathized with the plaintiff, who had a strong case. But the counsel for the defendants seemed to know his business, as he got none but active members of other denominations upon the jury, trusting that they would try to make proselytes of his clients. The verdict was for the defendants, and it could not be set aside.

§ 332. The last instance which we will cite is one of careful preparation beforehand. A father and son were indicted for murder, and the father had been acquitted. There was so much public feeling against the son, who was the actual slayer, that his counsel was very apprehensive that his strong defence might be overborne. Many of the citizens of the county had become disqualified as jurors because of having heard the evidence at the examination and at the trial of the father; and the counsel had good reason to fear the consequences of a change of venue. There had recently occurred a dissension in the Baptist church, to which the father belonged, and it arose out of an affair in which he was personally concerned. A, a preacher, had stood by the father, and B, another preacher, had taken the other side. Both of the preachers were popular, the influence of the former prevailing in one part of the county and that

of the latter in the opposite part. A entertained deep sympathy for the defendants, whom he honestly believed to be justified ; but he made no public demonstration. He was a man of unobtrusive manners, but of such transparent purpose, moderate views, and deep insight that his decided convictions were quietly adopted by all who had intercourse with him. It was especially fortunate for the defendant, that in the region where A's influence was the greater there was a larger number of persons not disqualified from being jurors. Somehow the prosecution overlooked the dissension mentioned, and did not see that it had silently and unconsciously even to the members passed into a division as to the case of the defendant. But his counsel detected it. He went through the names of all the citizens capable of jury service, marking every friend of the rival preachers. On the trial many panels were exhausted, and eleven jurors had been selected. Though a few names yet remained on the list, there was but one of a man qualified, as the defendant's counsel knew, and had the prosecution been aware of this they would have challenged him and effected a change of venue. The State put this man on the prisoner. He was of the following of B, but not of inveterate prejudice, and anyhow he had to be accepted. The defendant's challenges had been made so discreetly that this last-taken juror was the only representative of his faction on the jury, while several others of good standing were devoted friends of A. The contest on the evidence and in the argument was close and severe. There was an acquittal, and I always thought that the State failed because the leading counsel for the prosecution — a resident of the county, a member of the Baptist church, and a follower of B — had never discovered the significance for

him of the church agitation in which he had taken a prominent part.

§ 333. The foregoing examples have opened up the subject. There are various suggestions of your proper cue. Sometimes you need men of great intelligence or of great ignorance, or of great firmness or the opposite. The character of every one offered — whether he leans to mercy or severity or has other defined traits — must often be considered before you can choose or reject aright. You should keep an eye to religious denominations, political parties, clubs, Free Masons, Odd Fellows, and other societies, the different trades, occupations, and professions; for in all these one member is generally in sympathy with another. The common prejudices of the poor and debtor class against the rich and creditors, of residents in the country against those in the city, of the people generally against corporations, and others to which we have not time to allude, must be held in mind, to be used or avoided as is advised by your side of the case. And the friends of your client and of yourself, — his and your enemies, the partisans of the adversary and the claqueurs of his counsel, — the former are good, and the latter bad jurors for you. You must often exhaust the city directory and laboriously inquire of many people in order to be informed fully.

§ 334. No honorable member of the profession will tolerate canvassing and solicitations among those from whom the jury may come, or any effort to corrupt them after they are in the box. But you are to learn at the outset of your practice, that, if you neglect the study of your panel and the selection of your jurors according to the principles set forth above, a mistrial or an adverse verdict will often befall you when you ought to win.

CHAPTER VIII.

OPENING THE PLEADINGS AND OPENING THE CASE.

§ 335. THE case not having been continued or postponed and being called on, the jury selected and sworn, the plaintiff — the few cases in which the defendant takes the initiative excepted¹ — is to open the pleadings and his case. Our practice differs from the English. In England the junior counsel opens the pleadings, and then the leader states in detail the proofs of his side, which statement is called the opening of the case. The plaintiff's evidence is then put in, and if the defendant introduces no evidence the counsel of the former will not be heard again. After the plaintiff's evidence is finished the defendant's counsel makes the defence. If he has no evidence, all that he says will be a discussion of the proofs in order to show if he can that they do not entitle the plaintiff to recover. But if he has evidence, besides commenting on that of the other party, he will also make an opening of that which he intends to introduce. When his evidence is closed the leader for the plaintiff has the last word to the jury, called the reply.

In America the pleadings and the case are usually opened by the same counsel, and the argument of both sides is

¹ See Proffatt, *Jury Trial*, §§ 212, 214, 215, for the rule which settles when the defendant shall begin.

made to the jury after all the evidence is in. And it is evident that a discussion of the evidence made before it is adduced and sifted by examination is premature.

There is no uniform rule settling which one of the counsel shall make the opening for either the plaintiff or the defendant. I have noted a tendency to cede it to the junior; and I have never seen one counsel open the pleadings and another on the same side open the case.

§ 336. We will set out by giving what Mr. Cox says in presenting the English division of opening the pleadings and opening the evidence.¹

“The junior *opens the pleadings*; that is to say, he states to the jury the proceedings through which the issue or issues have been arrived at which they have to try. This should be done in the *shortest* and most simple manner. Nothing can be more absurd than to hear, as one often does, a long string of technicalities read to a jury, to whom every second word must be unintelligible and the effect of which must be to perplex them at the very beginning of their task and thus to some extent prevent them from approaching it with such clear intelligence as if it had been introduced to them in plain English. . . .

“Make your statement intelligible to the jury by putting it in an intelligible shape and in language which they can understand. As thus: ‘Gentlemen of the Jury, — In this case John Doe is the plaintiff and Richard Roe is the defendant. The action is brought to recover the sum of £21 and interest, being the amount of a bill of exchange drawn

¹ The first volume of Mr. Cox's Advocate appeared in 1852. It never reached a second edition, and he never published his contemplated second volume. As the book is scarce, we shall quote largely in this and succeeding chapters from parts of it which have long seemed to us very valuable.

by the plaintiff upon, and accepted by, the defendant. In answer to this claim the defendant has pleaded, 1st, that he did not accept the bill ; 2d, that he has paid it ; 3d, that it was obtained by fraud ; 4th, that no consideration was given for it. Upon these pleas issue has been joined, and these are the questions you have to try.'

§ 337. " But it will be said, perhaps, that however practicable this may be with so simple a case as an action on a bill of exchange, it could not be done where the pleadings are more technical, as in an action of trespass *quare clausum fregit*, for instance. This, however, will not be found incapable of interpretation into intelligible English. . . . Let us make the attempt : 'Gentlemen of the Jury, — In this case John Doe is the plaintiff and Richard Roe is the defendant. The action is brought to recover damages for a trespass by the defendant upon certain premises of the plaintiff, in Ide, in the county of Devon. The defendant has pleaded, first, that he is not guilty of the said trespass ; second, that he entered the premises in question by the leave and license of one James Brown, who was the tenant in possession of the said premises. To the second plea the plaintiff has replied that the said James Brown was not in lawful possession of the premises, nor entitled to give such leave and license ; and these are the questions you have to try.'

" A statement somewhat in this form might be made with equal ease, however various, complicated, or technical the pleadings, and indeed some such sketch must have been drawn in the pleader's mind or set down upon his notes before he put it into technical form."¹

§ 338. Mr. Cox next treats the opening of the case : —

¹ Advocate, 335-338.

“The pleadings opened by the junior, the leader proceeds to open the case to the jury ; and should you chance to fill this honorable post, you may glean some hints for your task from the following remarks.

“As a general rule, the statement of the case for the plaintiff should be calm, temperate, and dignified, orderly in arrangement, lucid in language, and as brief as the facts to be told will permit. . . . You cannot more effectually awaken in the court and the jury a sympathy for your wronged client and indignation against the wrong-doer, than by a simple description of the injury and a careful abstinence from angry comments, personal abuse, and other indications that revenge rather than redress is the object of the plaintiff. . . .

§ 339. “You will begin, of course, with an account of the parties, who and what they are, and the circumstances that led to the present dispute ; then you will state with precision the nature of the dispute itself, and whether it is upon a question of law or of fact, or both, with the very points at issue ; the one for the information of the court, and the other for the information of the jury, that attention may be directed more readily and surely to your evidence as it bears upon these points. Of so much importance is this that you should take some pains by previous preparation to put them into the most distinct shape, and you should repeat each one *totidem verbis* whenever you introduce your statement and when you close the evidence that bears upon it. Then, taking each of these questions in turn, state in the form of a narrative the proofs you propose to produce in order to its establishment, and in so doing be very careful to show no misgiving about it by anticipating objections, apologizing for defects, or making

an effort to give weight to certain witnesses, for you must *assume* that they are unimpeachable until they are shaken by your opponents, and their testimony to be conclusive until it is shown to be otherwise. . . . You should reserve your energies and your eloquence for the *reply*.

§ 340. "Strange as it may appear, there is nothing more difficult in the art of advocacy than effectively to open a case to a jury. The proof of this is the rarity of the exhibition. How few of our advocates accomplish it to the entire satisfaction of a critical listener! How few possess the faculty of marshalling facts in their natural order, and taking up and so interweaving distinct threads of a story as to form a clear, continuous, intelligible narrative."¹

§ 341. The same author thus advises the counsel who is to open the plaintiff's case : —

"It is your object to convey to them [the jury] and to the court a history of the case, so that they may thoroughly understand what is the subject matter of the contention, upon what grounds of claim or complaint you come into court, and the evidence by which you purpose to establish them. . . . You will commence of course with a description of the parties, who and what they are, with the addition of any circumstances in the position of either of them which may affect the case by explaining subsequent transactions or aggravating the damages. If locality is any way concerned describe the *locus in quo*, and, if it be possible to procure it, in all cases use a map for this purpose. The rudest drawing of a place is more intelligible than any verbal description, and it has the still more important use of at once arousing and fixing upon the story the attention of the jury. . . .

¹ Advocate, 335-341.

“Having described the persons and the place, take up your narrative at such period preceding the immediate matter of controversy as may be necessary to explain the causes of it, — to use a legal phrase, begin with the *inducement*. Show how it was that the conflict arose. Then describe minutely, with careful reference to the plan, if there be one, the subject matter of the dispute and the precise questions which the jury will have to determine in relation to it. This done, you will proceed to state *your* case, the facts and arguments upon which you rest your claim to the verdict. . . .

§ 342. “Perhaps the test whether you have done all that you should do previously to describing your testimony may be thus put: Have you made out such a case by your facts and arguments that, if you prove those facts and they be unanswered, the jury would be convinced that your claim or complaint was justly founded and would give you their verdict?

“This accomplished, and not before, you should proceed to state the particular evidence by which you propose to establish the facts you have detailed. . . .

§ 343. “Nothing is gained, but on the contrary a great deal is lost, by stating to the jury anything you cannot *prove*. They are not *convinced* by your speech, but by the evidence by which you substantiate your statement. You cannot hope to achieve more with the most impressible jurymen than to bring him to this: ‘Well, *if you prove what you say*, you will have my verdict.’”¹

§ 344. Mr. Cox considers how *doubtful* or *adverse* witnesses shall be treated, — advising that the former be opened as such, and that as to the latter you “point out

¹ Advocate, 342-347.

in the strongest colors the interests that operate upon them, as likely to warp their testimony, not only for the purpose of warning the jury against placing confidence in any evidence injurious to you which they may give, but also to make doubly influential whatever they may say in your favor.”¹

§ 345. Our author says at the last: “In concluding your opening it is rarely prudent to do more than briefly to repeat [to the jury] the outline of your case, and especially so much of it as goes to aggravate damages, winding up by a calm assertion of your confidence that, if you establish the case you have stated, you will be entitled to their verdict. Anything in the shape of a formal peroration, and especially any display of eloquence at the close of an opening, is out of place and in bad taste, and only permissible in a few exceptional cases, of which it must be left to your discretion at the moment to determine.”²

§ 346. Having given so much space to Mr. Cox, we must allude to Mr. Harris. The leading points emphasized by him are as follows. The opener is to manifest by his manner his faith in his cause; he is to refrain from constantly anticipating the other side; he is not to say such things as “I cannot conceive what defence my learned friend can have,” or, “It’s really, gentlemen, an undefended case,” — such remarks, as the author has observed, being very often followed with a “verdict for the learned friend who has no case or no defence”; “the principal thing in an opening speech is *arrangement and order*”; irrelevant matter is to be excluded; the statement of the issue and the controlling evidence is to be clear; time is not to be wasted on undisputed matters; moderation is more forcible than

¹ Advocate, 348, 349.

² Ibid., 349, 350.

exaggeration; no material point is to be omitted; the speaker is not to be too rapid; and that "Slow, sure, and short, is a good motto for young advocates."¹

§ 347. The rule in England, that, if the defendant has no evidence, the plaintiff's counsel will not be heard again, renders the opening far more important there than it is here; for peradventure it may be the only opportunity of the latter to comment on the evidence. With us the plaintiff's counsel can always make an argument after the defendant's counsel has decided to introduce no evidence, although the latter will in that case have the last word. In England, argument and appeal may often with propriety enter into the opening, while here they would be out of keeping. Our juries only expect a long speech after the evidence is closed. And the strengthening tendency to reserve all discussion and explanation for the argument proper has unduly lowered the common opinion of the purposes of an opening. Time and again do I hear the counsel for the plaintiff, after reading rapidly, and seeming not to care whether he is understood or not, the substantial parts of the pleadings, only add that he expects to support the allegations of the declaration by evidence, which he will not now take up their time to narrate. Both the court and the jury need a guide to the issues and the expected proof. You often note that the latter rouse up to learn the facts from the speeches. To the honor of our institutions of self-government and our general education, our juries are in the main intelligent, honest, and very desirous to find and do the right between contending parties. How can they fitly perform this high duty unless all the preliminary instruction which they need

¹ Hints on Advocacy, 6th English ed., Chap. I.

is furnished them? How can they understandingly go along with the shiftings of a voluminous evidence, often paralleling the play of a turning kaleidoscope, without some general notion given them beforehand both of this evidence and the issues. Even veteran judges are frequently found not to have detected the real question until they hear much of the argument. If they who are trained to listen and whose apprehensions have been artificially quickened are the better for a prefatory outline, much more do the laity in the jury-box require a patient and careful unfolding of the general features of the case at the beginning of the trial. In quoting extensively from Mr. Cox, and by summarizing the views of Mr. Harris, we essay a correction of the fault mentioned above as too common in America. We hope that a contemplation by the young lawyer of the importance attached to the opening in England — an importance which, as we have pointed out, it does not have here — would serve to counteract its undue depreciation in our country. And this explanation being made, we will now proceed to discuss the essentials of a proper opening in our courts.

§ 348. The pleadings are opened in order to suggest what are the issues. I have noted that often the plaintiff's counsel leaves it to the adversary to open the pleas. But the cross-examination is frequently directed to elicit facts favorable to the plea, and then there is a re-examination considering these facts again. Such a cross-examination and re-examination are only rightly prepared for by an opening of the pleas as well as the declaration. So it must be insisted that, after you tell the jury the claim of the plaintiff, you also state the allegations of the defendant denying or avoiding the claim. What we have quoted

from Mr. Cox in reference to the treatment of the pleadings leaves us but little to say upon the subject.

§ 349. If they are voluminous and intricate they should always be read, though there be an offer to waive the reading. But a lucid synopsis of them should first be made orally. No long document should ever be read without a clear though ever so brief statement of the points which it is expected to support. We are talkers by nature and readers by art. The judge and jury both prefer being talked to rather than being read to. After the oral statement recommended when the pleadings are read, the jury will understand even the technical terms, the judge will easily discern the questions of law, and both will receive a complete and vivid presentation of the issues made by the record.

§ 350. When the rule of law which you assume is novel or may appear to be repugnant to the current of decisions or the accepted construction of a pertinent statute or section of the code, it is well to be fuller to the judge than is ordinarily required. As soon as you have proceeded far enough with the record to make it appear that the rule as you assert it to be is material, you should indicate the authorities and reasons which you will handle *in extenso* in the argument. I have observed that, if the judge in the outset takes position against you on the law, he will often not attend as closely to the other particulars of your case as you would have him. You should always try to win the leaning of the judge at the earliest possible moment in the trial.

§ 351. We must now consider the treatment of the proofs. Mr. Harris's analysis of Sir Alexander Cockburn's opening speech in the trial of Palmer, charged with poi-

soning Cook, is an instructive chapter to the young lawyer.¹ The prosecution had to build on many subtle circumstances. It was a complication that, while Cook had been prepared by antimony, he was killed by strychnine, and this necessitated careful explanation of the diverse operations of the two substances and much scientific detail in educating the jury for the peculiar proofs. The speech, for all of its length, is in the main a genuine opening. It is made up of what we may call an introductory historical outline, a painstaking development of the turning questions of fact, and a narrative in little of the evidence. The case was one which in an American court would have demanded a far more detailed opening than usual; and it deserves study in order to fit the lawyer for such exceptional instances. But we are chiefly concerned to note what is proper in commonly occurring cases.

§ 352. The exact issues having been shown by giving the substance of the pleadings, the first thing to do with the facts is to give the propositions of each side. These are what Sir James Stephen calls the facts in issue as distinguished from relevant facts, the latter meaning the proofs of the former. Your own propositions should be arranged in the true natural order; and as a particular one is finished, the counter proposition of the adversary should be given. After this statement is finished it is in order for you to sketch, in as brief an outline as is easily intelligible, the evidence which you propose to offer in support of your *prima facie* case. It would be an impropriety to anticipate the adverse evidence and tell what will be yours in rebuttal; for the defendant can always decline to put in evidence, and whether he will do this and what

¹ Hints on Advocacy, 6th ed., 265-294.

range his proofs will take are secrets of his own. Remember that, even if the defendant has no evidence, you will have opportunity to comment upon the facts drawn out by his cross-examination and his positions when you make your argument.

§ 353. When Scarlett had reason to expect no evidence from the defendant he made a fuller opening than usual. But he ordinarily employed the conciseness which we recommend. He says:—

“It was my habit . . . to state, in the simplest form that the truth and the case would admit, the proposition of which I maintained the affirmative and the defendant's counsel the negative, and then, without reasoning upon them, the leading facts in support of my assertion. Thus it has often happened to me to open in five minutes a cause which would have occupied a speaker at the bar of the present day from half an hour to three quarters of an hour or more.”¹

In most cases the jury can be put in condition for intelligently following your proofs by a very short introduction, provided it plainly unfolds the grounds occupied by both parties and also gives a lucid narrative of your “leading facts.” It is well to hint the favorable character of important witnesses, and especially should you prepare the jury for those adverse to you in interest or feeling whom you must call. And as practice sharpens your insight you will learn what other topics must now and then be suggested in an opening.

§ 354. It is customary in America for the defendant to open his evidence. The pleadings have already been disposed of, and you have nothing to do with them except it

¹ See the fuller citation, *American Law Studies*, § 1082.

may be to set the plaintiff's counsel right in some misstatement. You are not expected at this stage to comment on the evidence of the adversary. Your business is to suggest that which you expect to produce. The opening of the plaintiff, his direct and your cross examination, have disclosed much of your case, and there is therefore more reason for conciseness in yours than in the opening of the plaintiff. As to most other matters, what we have shown to be essentials in the latter may be repeated here.¹

§ 355. The last thing which we have to say on the subject of opening the facts is that it should be subsequently aided by a progressive development of your evidence. The late Mr. B. H. Hill, of Georgia, kept his witnesses well in hand by proper questions and a restraint from excursion almost imperceptible, and he observed due order so closely through his examination that the jury had as little need for an opening as the spectators have for a prologue to a well-managed pantomime.

§ 356. The principle of an opening is fully stated by the great Roman institutional writer in a short sentence. He says:—

“When the parties came before the *judex* they used to preface the argument by setting forth the case to him concisely and in an abridgment; which was called *causae conjectio*, that is, a compression of the case into a brief outline.”²

Our lawyers of to-day can find in this the soul of the

¹ The reader may compare Cox, *Advocate*, 442-448; and the chapter entitled “As to Opening the Defendant's Case,” Harris, *Hints*, 6th ed., 161-170, where the subject is more widely distinguished from the opening of the plaintiff than is necessary in America.

² “Cum ad iudicem venerant, antequam apud eum causam perorarent, solebant breviter ei et quasi per indicem rem exponere: quae dicebatur *causae conjectio*, quasi *causae suae in breve coactio*.” — Gai. 4. 15.

subject, — a summary of all that we have said. The real use of the opening is to prepare for hearing witnesses and documents, no one of which tells the whole story of the case, and to suggest the issues which would otherwise have to be found by a generalization too burdensome for common judges and jurors.

CHAPTER IX.

BEGINNING OF CONDUCT OF THE EVIDENCE. — THE
EXAMINATION OF THE PARTY'S WITNESSES.

§ 357. AT the first we make a short sketch of the course of evidence in a trial, and the general principles of its conduct, and after this we devote the remainder of the chapter to the examination of one's own witnesses.

We start with the familiar rule that the party who holds the affirmative of the issue begins the evidence. He is only to make out a *prima facie* case, — a subject to be treated more fully hereinafter, — and he can usually reserve much of his testimony to reply to that of the adversary. The plaintiff having rested, if the defendant does not make a motion for a nonsuit and prevail, and if he does not choose to stand on the case already made, he puts in such evidence as he has to avoid the effect of his adversary's; when he rests. The plaintiff can then support his own proof where it has been attacked, and also attack the attacking evidence by other evidence. He can now prove no additional facts in issue; he can only fend off the aggression of the other side or contradict its testimony. When the plaintiff has re-established his case he will pause again. The defendant can in turn re-enforce his impugned evidence and disprove the testimony last introduced by the plaintiff. And so the parties may go on

and run a parallel to the old course of pleading, to wit, declaration, plea, replication, rejoinder, surrejoinder, rebutter, and surrebutter. The plaintiff's first evidence corresponds to the declaration; the defendant's first, to the plea; the plaintiff's second, to the replication; the defendant's second, to the rejoinder; the plaintiff's third, to the surrejoinder; the defendant's third, to the rebutter; and the plaintiff's fourth, to the surrebutter. A standard author says: "After the surrebutter the pleadings have no distinctive names; for beyond that stage they are very seldom found to extend."¹

The evidence may be documentary as well as oral. Sometimes it will be all documentary, though this will occur but seldom.

§ 358. We now take up the examination of witnesses. And while we here quote a passage in reference to those of the plaintiff, we remind the reader that our subject in this chapter is the direct examination of the witnesses on both sides. Mr. Cox says:—

"The plaintiff's case being stated by the leader, the examination of the plaintiff's witnesses proceeds. The general rule is for the counsel on that side to conduct the examination of the witnesses in turn, the junior taking the first witness, probably because it was supposed that the leader would require rest after his speech. But this order is somewhat departed from under special circumstances, as where the witness is peculiarly important or his examination demands peculiar skill, in which case the leader will propose to take him;—a suggestion to which you should always readily and cheerfully assent; and indeed when such a witness chances to fall to your lot it would

¹ Steph. Pl. 59.

be becoming in *you* to propose to your leader that *he* should call him, and thus to anticipate the delicacy that often prevents a leader from doing that which may look like a want of confidence in you." ¹

§ 359. The author is not aware of any American rule which settles what counsel shall examine. This is one of the discretionary matters which is generally disposed of by agreement at the consultation before the trial. If there has been no such agreement, the counsel whose leadership is conceded either examines or directs an associate to perform the duty. Other things being equal, that counsel should examine who is best acquainted with the expected proof, if it be at all difficult to elicit. Generally different parts of the case have been got up by different counsel, and possibly but one of them has had an interview with a particular witness. It is plain that this counsel, if he has the ordinary qualifications, should examine the witness whose narrative he knows.

And the author has noted that where the facts are many and intricate and the case so doubtful as to require elaborate discussion, it is better for the counsel who is to make the main argument not to examine any of the witnesses. He will then be free to take careful notes, and at every pause he can be casting the balance of the testimony instead of puzzling in anticipation over the next witness, or the cross or the re-examination. And while thus playing the part of auditor he can be of great assistance to his associate examining, to whom he will only make suggestions of important questions which would otherwise be omitted.

§ 360. It being decided what counsel shall act, and the

¹ Advocate, 351.

witness being on the stand, the examination of the latter begins. The pleadings of the plaintiff, his declaration, or his bill in equity, or the bill of indictment, contain certain propositions of fact which must be proved, and the purpose of the direct examination of the plaintiff's or the State's witnesses is to prove them, as it is the purpose of the defendant's direct examination to prove the material propositions of fact in his plea or answer. We take for granted that our examiner is lawyer enough to distinguish what is good evidence and what is not. Knowing the expected narrative of the witness either from having talked with him or from having digested full instructions of a reliable associate, he will so shape his questions as to elicit the material parts. He is to draw out every bit of that which is favorable to his client, and nothing unfavorable or as little as possible. But if there is something adverse apparent on the surface, the examiner in chief had better draw it out himself. Thus the witness may be a near relative of the party, or a warm friend, or jointly interested with your client, and these facts may be as well known to the adversary as to yourself. It is idle to try to suppress them; and the one calling the witness will gain credit if he proves them, while it might be used to his disadvantage if he does not.

§ 361. But we must not go too fast. It seems better to give an outline of what the counsel should do in common cases. Your ordinary witness is self-possessed if you do not snub or chill him, is honest, and not at all stupid if your questions are put in every-day language. Our first business is with him, and when that is finished we shall deal with the exceptional classes. We premise that you have made a proper arrangement of your proofs, as we

counselled above; and that you will call your witnesses in corresponding order. The material parts of a transaction are generally testified to with best effect by the witness in his own way, if he be started right. While he is engaged upon these it is usually well not to divert his attention and stop the flow of his recollection by needless questions. The art necessary is in preparing him for this narrative. If he is a little awkward because of his unfamiliarity with the court-room, you can reassure him by a manner which is kind and considerate, but not offensively patronizing as we observe it to be too often. There are generally many small details, such as the relation of the witness to the party, the means of his knowledge, etc., which can be made to introduce him to the jury and their credit, and which, as we have just suggested, can be used to give him ease.

§ 362. When you have brought him to a matter of substance upon which you must interrogate him, you are no longer to lead him. If leading questions are used they discredit the witness, who seems to give prompted testimony; they sometimes ensnare him into incorrect answers; and should he reply counter to their suggestions, as he will often do, you yourself are disparaged. Mr. Harris truly says of them that if they are allowed by your opponent "it is generally to your disadvantage."¹ He gives the right rule in these words: "A question, without being leading, should be a *reminder* of events rather than a test of the witness's recollection."²

§ 363. The following passage from Mr. Cox, showing both the proper use of the questions now under consideration, and when and how they are to be avoided, is given for consideration and comment:—

¹ Hints on Advocacy, 6th ed., 38.

² Ibid., 33.

“The rule against leading questions is properly applicable *only to such questions as relate to the matter at issue*. Whatever some priggish opponent may protest, it is permitted to you, and the judges will encourage you in the practice, to lead the witness directly up to the point at issue. It saves time and clears the case, and if you narrowly observe experienced advocates you will find that they always adopt this course. For instance, instead of putting the introductory questions, ‘Where do you live?’ ‘What are you?’ and so forth, you should, unless there be some special reason to the contrary, directly put the leading question, ‘Are you a banker carrying on business in Lombard Street?’ and so on, until you approach the questionable matter, when of course you will proceed to conduct the examination according to the strict rule.

§ 364. “But that rule is not so easily to be observed as you may suppose. Frequently it will occur that you will have need to call the attention of the witness to something he may have forgotten; as thus. Suppose that you were examining as to a certain conversation. The witness has narrated the greater portion of it, but he has omitted a passage which is of importance to you. We know that in fact with all of us in our calmest moments it is difficult to repeat perfectly the whole of what was said at a certain interview, and if it had been a long one, probably we might repeat it half a dozen times and each time omit a different portion of it, although in either case the omitted part would be instantly recalled to our memories if we were asked, ‘Did he not also say so and so?’ or, ‘Was not something said about so and so?’ But this sort of reminiscent question you are not permitted to put to a witness because it would be a leading question. . . . In

vain you ask him, 'Did anything more pass between you?' 'Was nothing more said?' 'Have you stated all that occurred?' . . . It would flash upon him instantly if it were to be repeated or even to be half uttered. But you may not help him so, and then there arises a perplexity which every advocate must often have experienced, — in what manner can this be recalled without leading? . . . Your endeavor must now be to suggest indirectly the forgotten statement; and to do so without violating the rule which in this respect is certainly pushed further than justice and fairness to the infirmity of human memory can sanction. As each case must depend upon its circumstances it is impossible to lay down any rule to help you, or even to hint at forms of suggestion. But one method we may name as having proved efficacious when others had failed, and that is to make the witness *repeat* his account of the interview or whatever it may be; then it will not unfrequently happen . . . that he will remember and repeat the passage you require, and omit something else which he had previously stated. But this of course matters not; your object has been gained and your adversary may take what advantage he can of the difference in the statements. If the story is a long one you will avoid inflicting this repetition of it until other expedients have been tried in vain. It may be added that a single word often suffices to suggest the whole sentence; if you have a quick wit you may sometimes bring out the matter you want by so framing a question that it shall contain a part of the forgotten sentence, *ipsissimis verbis*, but otherwise applied."¹

§ 365. We remark as to this quotation that it assumes a more stringent rule than now exists; and further, that it

¹ Advocate, 355-357.

exaggerates the difficulty mentioned. You are always permitted to lead the witness to a particular subject. The question, "Was not something said about so and so?" which Mr. Cox says is not to be asked, is permissible, provided it is only suggestive of the special thing to which you are trying to direct the witness. That is quite different from the other, "Did he not say so and so?" which is leading, as it goes beyond mere mention of the subject and suggests the answer desired. The instances given in the last sentence of the passage are by no means as exceptional as they are there represented. The witness's recollection of even the minutest fact can always be drawn out by unexceptionable interrogation. When he has made an omission you are not to resort to the questions supposed by Mr. Cox to be vainly put, such as, "Did anything more pass between you?" "Have you stated all that occurred?" They but burn daylight. You must particularize. Suppose your witness is testifying to the confession of a burglary. He states most of the details, but he forgets one that you deem of importance as affording you opportunity of corroboration. You may thus make your question a proper "reminder," — to use Mr. Harris's phrase quoted above: "If the defendant told the place where he got the crow-bar [which was mentioned in the previous testimony of the confession] and how he got it, what did he say?"

It will profit the young lawyer to train himself, while sifting parties and witnesses in his chambers, to draw out all of their knowledge without ever asking a leading question. When the habit is once fixed he will find not only that he prepares them better for examination in court, but that he has also acquired an effective faculty for the courtroom which is too little cultivated.

§ 366. It is patent that your questions should be expressed in plain language and should be as short and clear as is compatible with your object. You are to make the witness understand you. But this is not enough. By reason of his previous conference with you, he may understand when the jury and the court are in the dark. The following passage from Mr. Harris is in place here.

"I will give an instance how *not* to examine a witness. It is an almost verbatim report of what actually occurred recently at a trial when an experienced junior was examining in chief:—

"'Were you present at the meeting of the trustees when an agreement was entered into between them and the plaintiff?' Answer, 'Yes.'

"Q.—'Will you be kind enough to tell us what took place between the parties with reference to the agreement that was entered into between them?' This is an instance of verbosity which shows that, in putting questions, *long-drawn sentences should be avoided*. The more neatly a question is put, the better, as it has to be understood not only by the witness but by the jury. All that was necessary to be asked might have been put in the following words: 'Was an agreement entered into between the trustees and the plaintiff?' 'What was it?'

"It will appear even more strange, perhaps, when I say that, after the answer was given by one witness, which was all that was necessary to prove that part of the case, the question was repeated to another with additional verbiage: 'Will you be good enough to inform us what took place upon that occasion between the parties, as nearly as you can, with reference to the agreement that was then, as you have stated, entered into between them? Please tell,

us, not exactly, but as nearly as you can in your own way what his exact words were.'"¹

§ 367. The following advice of Mr. Harris finds a place here. It is all excellent, except that the liability of the witness to confusion is much overrated.

"The best thing the advocate can do . . . is to remember that the witness has something to tell, and that but for him he would probably tell it very well 'in his own way.' *The fewer interruptions therefore the better; and the fewer questions, the less questions will be needed.* Watching should be the chief work; especially to see that the story be not confused with extraneous and irrelevant matter. The chief error the witness will be likely to fall into will be hearsay evidence: either he says to somebody or somebody says to him something which is inadmissible, and delays the progress of events. But the witness being very tender, you must be careful how you check the progress of his 'he says,' 'says he,' or you may turn off the stream altogether. Pass him over those parts as though you were pushing him through a turnstile, and then show him where he is; or as if you were putting a blind man with his face in the direction he wished to go, then leave him to feel his way alone.

"The most useful questions for eliciting facts are the most commonplace, 'What took place next?' being infinitely better than putting a question from the narrative in your brief which leads the witness to contradict you. The interrogative 'yes,' as it asks nothing and yet everything is better than a rigmarole phrase, such as, 'Do you remember what the defendant did or said upon that?' The witness after such a question generally feels puzzled, as if you

¹ Hints on Advocacy, 6th ed., 42.

were asking him a conundrum which is to be passed on to the next person after he has given it up."¹

§ 368. Of course as you should ask as few questions as is necessary, it is folly to press and sift the witness too far. Mr. Harris says : —

" *Never cross-examine your own witness.* . . . You will hear an advocate cross-examine his witness over and over again without knowing it, if he have not the restraining hand of his leader to check him.

" Before Mr. Justice Hawkins not long since a junior was conducting a case which seemed pretty clear upon the bare statement of the prosecutor. But he was asked, 'Are you *sure* of so and so?' 'Yes,' said the witness. 'Quite?' inquired the counsel. 'Quite,' said the witness. 'You have no doubt?' persisted the counsel, thinking he was making assurance doubly sure. 'Well,' said the witness, 'I have n't much doubt, because I asked my wife.'

" Mr. Justice Hawkins : 'You asked your wife in order to be sure in your own mind?' 'Quite so, my lord.' 'Then you had some doubt before?' 'Well, I may have had a little, my lord.'

" This ended the case, because the whole question turned upon the absolute certainty of this witness's mind."²

To complete this section, we suggest that you can prevent your witness from stating unfavorable facts within his knowledge, either by keeping him well away from them, or in case you must bring him near them by so framing your questions and confining them to particular and minute matters as to allow him no scope for answering what you desire to exclude. These unfavorable facts may be the business of your adversary, which you need not do for him.

¹ Hints on Advocacy, 6th ed., 31, 32.

² Ibid., 37, 38.

Often, however, it is good policy, as we have already urged, for you to prove the adverse. To do so may gain credit for an interested witness in more important parts of his testimony and it may create with the jury an effective opinion of your fairness. It has also the advantage of taking the wind out of the cross-examiner's sails.

§ 369. There is a heedfulness which should never be abandoned. Mr. Cox has a passage on this topic worthy of consideration.

"Your questions in examination in chief should be framed carefully and put deliberately. . . . You should weigh every one in your mind before you put it, in order that it may be so framed as to bring out in answer just so much as you desire and no more. . . . The court will soon learn not to be impatient of your seeming slowness when it discovers that you have in fact abbreviated the work by a pause which has enabled you to keep the evidence strictly to the point at issue. They who remember Sir William Follett will at once understand our meaning, for one of his most remarkable and impressive peculiarities was the grave and thoughtful deliberation with which he framed and put his questions to his own witness, and the result of which was that he was seldom annoyed by unexpected answers, or by additions and explanations which he did not desire."¹

The most ordinary fault which we observe is redundant and ill-considered examination. The counsel believes that in order to exhaust his witness's knowledge he must keep up a long fire of questions, where fewer, properly selected, would be far better. A foolish question is often a snare to your witness. He wishes to oblige you, and he answers

¹ Advocate, 364.

something which the cross-examination makes good use of. Let it be your aim always to draw out what you desire by the fewest questions and to permit your witness to answer these only.

The last hint which we give here is that you should in general follow the prevailing current of the transaction in hand. The chronological order is not to be adopted at all times.¹ It will often be beneficial to bring out prominent and important facts independently, — to make them conspicuous by isolation. At the close of a considerable narrative frequently you must turn the witness back to matters which he has failed to tell. And it may be well to bring about breaks in a long continuity, to recover the attention of the jury, to rest yourself or the witness. When you understand that he is to be sifted thoroughly, that what he says is to be made intelligible and impressive to those appointed to hear him, and that harm to yourself and help to the other side are to be avoided, you keep hold of the light which shows you the true way.

§ 370. We have nearly finished what we wished to say of the direct examination of the ordinary witness, — the typical American witness, as we may call him. We only add, that his knowledge of facts supporting the *prima facie* case is to be exhausted. When you think that your task is done, run over his testimony rapidly in your mind, or glance through your memoranda, or inquire of your associates, to see if anything yet remains to be proved by the witness. Supply all omissions by well-directed inquiries before you turn him over to the cross-examiner. Thus you will avoid having to recall your witnesses. One who

¹ Macaulay, the best of all story-tellers, says, "Mere chronological order is not the order for a complicated narrative."

returns to the box creates often an unfavorable opinion because of a suspicion that he is now testifying what has been suggested to him. Of course, if you have some commanding reason you will not fail to recall; and generally you should take pains to show why you did not question him before as you do now.

§ 371. Having treated the average witness, we will now devote a few sections to those of exceptional character.

“If your witness be timid, it will be your care to restore his self-possession before you take him to the material part of his testimony. This you should effect by assuming a cheerful and friendly manner and tone; and if you have the art to make him smile, your wit would be better timed than is always the case with forensic jests. Keep him employed on the fringe of the case until you are satisfied that his courage is restored, and then you may proceed with him as with any other witness. But be very careful not to take him to material topics while he is under the influence of fear; for in this state a witness is apt to become confused and to contradict himself, and so to afford to your adversary a theme for damaging comment.”¹

With the last quotation compare the pertinent Golden Rule of David Paul Brown: —

“If they [your witnesses] are alarmed or diffident and their thoughts are evidently scattered, commence your examination with matters of a familiar character remotely connected with the subject of their alarm or the matter in issue, as, for instance: Where do you live? Do you know the parties? How long have you known them? etc. And when you have restored them to composure and the

¹ Cox, *Advocate*, 361.

mind has regained its equilibrium, proceed to the more essential features of the case, being careful to be mild and distinct in your approaches lest you may trouble the fountain again from which you are to drink."¹

§ 372. Upon the quotations in the last section we remark that it is your business to anticipate the fright or discomposure of the witness by noting his manner and words in the office. Women and diffident men will volubly pour out to you their fears of the court-room, if you will but listen; and listen you ought, to be prepared for their examination or to prepare your associate. If you will accept their confidence you will find them leaning on you as a protector and furnished the better therefrom for the day of trial. But sometimes, in spite of the most prudent anticipation, the witness will be discomposed when he is called, and if so the advice given in the quoted passages is admirable.

These timid witnesses often need support. We may especially apply to them what the old authority advises as to all: "They should be well exercised before they are brought into court and tried with various interrogatories, such as are likely to be put by an advocate on the other side. By this means they will either be consistent in their statements, or if they stumble at all will be set upon their feet again, as it were, by some opportune question from him by whom they were brought forward."²

Your more self-possessed witnesses, as well as those now under consideration, will be profited by *rehearsals* and severe cross-examination from yourself. And the course advised will also better furnish you for the direct examination.

¹ Second Golden Rule.

² Quintilian, Institutes, V. 7. 11.

§ 373. But to return to the extra-curial treatment of timid witnesses, we give an example from Webster's practice. He was for a will impugned on the ground that one of the three witnesses thereto was insane. It was notorious that this particular witness, a young man of morbid if not unsound mind and great sensitiveness, had once tried to drown himself. He was in so much mental commotion at the prospect of cross-examination as to this fact that the associate counsel had pronounced in favor of not calling him. But Webster insisted that he be allowed to decide the true policy after he had talked with the witness. He contrived an interview. He won the young man's confidence, and drew from him an account of his life, the attempted suicide, the hearty repentance, and the assurance of forgiveness which he felt. The rest we give in the words of the great advocate, as reported by a biographer.

"When about leaving him I told him that I wished him the next day, when I would summon him into court, to go there, and consider me as his friend. . . . I said: 'You have the sympathy of everybody; and I wish you to tell, in answer to my questions, the story of your life as you have told it to me, merely to show to the jury and court the condition of your mind. You may feel absolutely confident that nobody shall harm you.' He went into court the next day and told the story so eloquently that there was hardly a dry eye in the court-room. . . . When the young man had left the stand I felt secure in my case; and it was won upon that single point."¹

§ 374. Mr. Cox notices the *stupid* witness: —

"He cannot understand your questions or he answers them so imperfectly that he had better have left them un-

¹ Harvey, *Reminiscences*, 105-110.

answered. With such a one the only resource is patience and good temper. If you are cross with him you will be sure to increase his stupidity and to convert evidence that means nothing into evidence that is contradictory and confused. The preservation of imperturbable good temper is a golden rule with an advocate. . . . Entire self-command is his greatest virtue, never more in requisition than in dealing with a stupid witness. Instead of rebuking him you should encourage him by a look and expression of approval, and you must frame your question in another shape better suited to his dense faculties. If baffled again do not retreat, but renew the catechism until your object is obtained. In constructing your questions you will often find a clue to his links of thought by observing his answers, and your next question might then, with a little ingenuity, be so framed as to fall in with his train of ideas. Thus patiently treated there are few witnesses so dull as not to be made efficient for the purpose of an examination in chief." ¹

§ 375. I will add that the trouble with a dull or stupid or uneducated witness is often prolonged because the examiner keeps himself in a region elevated above the comprehension of his answerer. He must learn to lower to his level. One who can make children always understand him will know how to deal with a dunce of a witness. We give in a note below an example from an eminent novelist, illustrating how a superior mind can lock itself up to an inferior of even a high degree of intelligence.²

¹ Advocate, 361, 362.

² In the following passage from Bulwer's "My Novel," Dr. Riccabocca begins:—

"For your sake, young gentleman, I regret that your holidays are so

This is the fault of the former. It is easier for the other to understand the superior in intellect, if the latter will only learn how to talk to him, than to understand what an equal says to him on subjects out of his accustomed range of thought.

§ 376. "There are two kinds of troublesome witnesses whom you will have to encounter in the conduct of a cause, — those who say too much and those who say too little. Of these by far the most difficult to deal with are your over-zealous friends, — your witnesses who *prove too much*. A very little experience will enable you to detect

early ; for mine I must rejoice, since I accept the kind invitation you have rendered doubly gratifying by bringing it yourself.'

"'Deuce take the fellow and his fine speeches ! One don't know which way to look,' thought English Frank.

"The Italian smiled again, as if this time he had read the boy's heart without need of those piercing black eyes, and said less ceremoniously than before, 'You don't care much for compliments, young gentleman.'

"'No, I don't, indeed,' said Frank heartily.

"'So much the better for you, since your way in the world is made ; it would be so much the worse if you had to make it.'

"Frank looked puzzled: the thought was too deep for him, so he turned to the pictures.

"'These are very funny,' said he ; 'they seem capitally done. Who did 'em ?'

"'Signorino Hazeldean, you are giving me what you refused yourself.'

"'Eh ?' said Frank, inquiringly.

"'Compliments.'

"'Oh — I — no ; but they are well done ; are n't they, sir ?'

"'Not particularly : you speak to the artist.'

"'What ! you painted them ?'

"'Yes.'

"'And the pictures in the hall ?'

"'Those too.'

"'Taken from nature, eh ?'

"'Nature,' said the Italian sententiously, perhaps evasively, 'lets nothing be taken from her.'

"'Oh !' said Frank, puzzled again. 'Well, I must wish you good morning.'"

these personages almost at a glance, certainly after a few sentences. They usually try to look wonderfully easy and confident; answer off-hand with extraordinary glibness and give you twice as much information as you have asked for. . . . Keep such witnesses closely to the point for which they are required, and having got from them just what you want dismiss them, right thankful if they have not done you more harm than good."¹

Compare with this the directions of David Paul Brown: "As to your own witnesses: if they are bold and may injure your cause by pertness or forwardness, observe a gravity and ceremony of manner towards them which may be calculated to repress their assurance."²

§ 377. The counsels of both authors are valuable. I will however suggest that it is the business of counsel to know beforehand what is the inclination of a witness. No *gentleman* of the bar will ever tell one to say anything but the truth; but he will be remiss in his duty when he finds him in the consultation-room bold, hasty, pert, forward, or too partisan, not to rebuke and reprove him into a more becoming behavior, and thus rightly prepare him for the witness-box. For all of this precaution the advice of the Golden Rule just quoted must now and then be followed.

§ 378. "If you perceive that the mind of the witness is imbued with prejudices against your client, hope but little from such a quarter: unless there be some facts which are essential to your client's protection and which that witness alone can prove, either do not call him or get rid of him as soon as possible. If the opposite counsel perceive the bias to which I have referred, he may employ it to your own ruin. In judicial inquiries, of all possible evils the worst

¹ Cox, *Advocate*, 358, 359.

² First Golden Rule.

and the least to be resisted is an enemy in the disguise of a friend. You cannot impeach him ; you cannot cross-examine him ; you cannot disarm him ; you cannot indirectly even assail him ; and if you exercise the only privilege that is left to you and call other witnesses for the purpose of explanation, you must bear in mind that, instead of carrying the war into the enemy's country, the struggle is between sections of your own forces and in the very heart perhaps of your own camp. Avoid this by all means."¹

§ 379. The rule of David Paul Brown last quoted assumes that a witness often eludes the watchfulness of party, friends, and counsel, proving at last upon the stand to be but a spy. Prudence will guard against such a catastrophe.² Every witness of doubtful character should be committed to his narrative in the hearing of those who will quickly bear him down if he swerve. The party is not at the mercy of a treacherous witness. The true policy

¹ Fourth Golden Rule of David Paul Brown.

² Compare this from Quintilian : "In regard to witnesses who are consistent in their evidence we must be on our guard against treachery ; for they are often thrown in our way by the opposite party, and after promising everything favorable give answers of a contrary character, and have the more weight against us when they do not refute what is to our prejudice but confess the truth of it. We must inquire, therefore, what motives they appear to have for declaring against our adversary ; nor is it sufficient to know that they *were* his enemies ; we must ascertain whether they have ceased to be so ; whether they may not seek reconciliation with him at our expense ; whether they have been bribed ; or whether they may not have changed their purpose from penitential feelings ; precautions not only necessary in regard to witnesses who know that which they intend to say is true, but far more necessary in respect to those who promise to say what is false. For they are more likely to repent and their promises are more to be suspected ; and even if they keep to their word it is much more easy to refute them." Institutes, V. 7. 12-14.

The advanced morality of our day comes out as we see from the conclusion of this quotation that the author did not reprehend the use of witnesses who had promised the client to swear falsely.

is by proper means to avoid or to unarm him. If you are surprised, show that he has entrapped you and then impeach him by his contradictory statement made to your client or his friends. If you cannot do this, a straightforward and manly grappling with the traitor will turn the sympathy powerfully against him. The law and the courts are becoming too wise to allow justice to be cheated under irrational rules. The most busy and eminent counsel can at least, in the consultation the night before the trial, carefully probe and search all the witnesses of the client's following, and thus be forewarned against any lurking partisan of the adversary.

§ 380. But the hostile witness must often be well examined, and what Mr. Cox says on this subject should be considered here; we therefore append it:—

“There is no more difficult and delicate task in the conduct of an examination in chief than so skilfully to manage an *adverse* witness called by yourself that he shall state just so much as you require and no more.

“When the court is satisfied that the witness is really an adverse one, the strict rule that forbids leading questions will be relaxed, and you will be permitted to conduct the examination somewhat more after the manner of a cross-examination. . . . As a general rule it may be taken that the less you say to him the better for you. Bring him directly to the point which he is called to prove; frame your questions so that they shall afford the least possible room for evasion, or, what is still worse, *explanation*. . . . If you are satisfied *beyond doubt* of his hostility, and he should, as is often seen, assume a frank and friendly mien in the witness-box, instead of accepting his approaches, reject them with indignation; let him see that you under-

stand him and are not to be imposed upon, and endeavor to *provoke* him to the exhibition of his *true* feelings. . . . It is the first care of a skilful advocate in dealing with his own adverse witness not only *not to conceal* the hostility, but to make it prominent, — to provoke it to an open display and *draw out* the expression of the feeling, if it does not sufficiently appear without a stimulus. If he be adverse at all, *you cannot make him appear too adverse*, because the more hostile he is, the more will his evidence in your favor be esteemed, and the less weight will be given to such as he may utter against you.”¹

¹ Advocate, 359-361.

Quintilian advises the accuser to rein in the willing, and spur the unwilling, witness as follows : “ Of witnesses who are summoned to give evidence, some are willing to hurt the accused party and some unwilling. . . . Let us suppose that the accuser knows the inclination. . . . If he find the witness disposed to prejudice the accused, he ought to take the utmost care that his disposition may not show itself ; and he should not question him at once on the point for decision, but proceed to it circuitously, so that what the examiner chiefly wants him to say may appear to be wrung from him. Nor should he press him with too many interrogatories, lest the witness by replying freely to everything should invalidate his own credit ; but he should draw from him only so much as it may seem reasonable to elicit from one witness. But in the case of one who will not speak the truth unless against his will, the great happiness in an examiner is to extort from him what he does not wish to say ; and this cannot be done otherwise than by questions that seem wide of the matter in hand ; for to these he will give such answers as he thinks will not hurt his party ; and then from various particulars which he may confess he will be reduced to the inability of denying what he does not wish to acknowledge. For as, in a set speech, we commonly collect detached arguments which taken singly seem to bear but lightly on the accused, but by the combination of which we succeed in proving the charge, so a witness of this kind must be questioned on many points regarding antecedent and subsequent circumstances, and concerning places, times, persons, and other subjects ; so that he may be brought to give some answer ; after which he must either acknowledge what we wish, or contradict what he himself has said. If we do not succeed in that object, it will then be manifest that he is unwilling to speak ; and he must be led on to other matters that he may be caught tripping if

§ 381. The examination of a stubborn witness of this kind must often be carefully premeditated. Sometimes persistent and detailed interrogation is your only cue, while again you may have to prepare the way by testimony with which he will not dare to collide. A firm of manufacturers had contracted with an agent to sell for them in a particular territory, reserving the power to discharge him on giving ten days' notice. They were bound to fill all orders for their products at given prices forwarded by the agent. Several months after the connection commenced the agent received an unexpected notice terminating the agency, and, what was more unexpected, his bookkeeper threw up his place and announced that at the expiration of the ten days he would represent the manufacturers in the territory mentioned. The agent had left the business almost wholly to the bookkeeper, and therefore in a suit against the firm he had to prove most of the items in his account by the latter, who had become very hostile to him. In the direct examination this witness was carried through the pertinent entries in the books and letters in the press-book, — all in his handwriting. The letters contained many orders which the firm denied having received. Of course the originals had been called for properly. The witness was forced to admit that he had duly mailed every letter which he had copied. As to a few items which could not be established in this way, he was made to hear beforehand certain reputable men testify that he had taken their orders, and this induced him to say that these also possible on some point, though it be unconnected with the cause ; he may be detained an extraordinary time, that by saying everything, and more than the case requires, in favor of the accused, he may make himself suspected by the judge ; and he will thus do no less damage to the accused than if he had stated the truth against him." Institutes, V. 7. 15-19.

had been forwarded. Every answer proving an item came from him like the drawing of an eye-tooth, while he was voluble in insinuations against the honesty of his former employer who had put unwonted trust in him. His conduct as revealed under examination looked so much like treachery as to turn public sympathy against the defendants, who at last succumbed and paid most of the agent's claim.

The right treatment of such a witness is like the cross-examination purposed to pull out facts from one who would hold them back. When you must use him, your opening of the evidence should parade his hostility and explain the necessity of your calling him. And we will anticipate a part of your duties as cross-examiner which can be appropriately glanced at here, by warning you to stand on your guard against the spurious hostile witnesses of the other side. Be not deceived into relying upon them as allies, and be ingenious enough to make them unmask.

§ 382. In close connection with the foregoing is the third Golden Rule of David Paul Brown : —

“ If the evidence of your own witnesses be unfavorable to you (which should always be carefully guarded against) exhibit no want of composure ; for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel.”

It is a still greater reason for maintaining your composure that otherwise you will often fail to find the right way around the unexpected answer.

§ 383. But avoid the hostile witness if you can. David Paul Brown says in the fifth Golden Rule : —

“ Never call a witness whom your adversary will be

compelled to call. This will afford you the privilege of cross-examination, take from your opponent the same privilege it thus gives you, and in addition thereto not only render everything unfavorable said by the witness doubly operative against the party calling him, but also deprive that party of the power of counteracting the effect of the testimony."

§ 384. We have reviewed in detail the different leading classes of witnesses from the standpoint of the direct examiner. We have yet something to add before his duties are fully presented.

§ 385. Mr. Cox says : —

"Great caution is required in the examination of all your witnesses after the first to prevent their disagreement in any important particulars. No error of inexperience or unskilfulness is more common than to examine a witness *according to the brief*, without reference to the evidence previously given and the requirements of the case as it stands. If you fear that there may be conflicting testimony on any point, the first witness having varied from the statement in the brief, it is usually better to leave it as it stands upon that single testimony than to bring out a contradiction ; but upon this you must exercise your sagacity at the moment ; it must depend upon the particular facts of the case ; we only suggest to you that it is one of the difficulties of examination in chief which you should be prepared to encounter."¹

This passage shows the incurable evil of the English division of counsel and attorney. According to their usages counsel would be degraded by any other communication with the witnesses than while they are in the box.

¹ Advocate, 357, 358.

Familiar contact with them is for the attorney alone, who is of inferior grade and ability; and whose misapprehension of the testimony is often a snare to the examiner, when if the latter could have had a few minutes private intercourse with the witness he could have corrected it and perhaps steered the cause around the breakers. Let the American lawyer avoid this evil by talking with the witnesses for himself, and thus come to the trial fully informed. He will thereby find out in time all the material conflicts between them.

§ 386. This subject of avoiding conflicts in one's testimony is so important that we will give an illustrative case. The reader is asked to recall the instance already used by us,¹ where the caveator of a will introduced the testimony of two women, who while they agreed as to the main fact yet contradicted each other in so many other particulars of importance as to bring discredit upon themselves. We said it was a blunder in the preparation that their discrepancies had not been discovered beforehand; and then only the one disinterested should have been examined. But we are now concerned with another blunder which was committed on the trial. The caveator put in evidence the testimony of both witnesses. This he was not obliged to do. He could have relied on the disinterested witness, and if the propounders had introduced that of the other they would have been held to the rule that they could not discredit their own witness, who be it remembered testified positively for the caveator as to the cardinal proposition. And had the propounders left the testimony of this disinterested woman unattacked, — and they had no means of attacking it save by that of the other, — it is difficult to

¹ *Ante*, § 118.

see how they could have avoided an adverse verdict. As it was, the caveator seemed to believe that, because he had taken the testimony of both women by commission, he must use all of it. And so he not only prepared adverse evidence, but he actually introduced it when there was no need, and thereby broke down his case.

§ 387. We have run over the usual incidents of direct examination which lie on the surface. We have reserved for this place a consideration of its real purpose and end. It is to be remembered that until the argument all of the evidence as it comes out is treated as true. The object of a party is to make his evidence complete before he rests, either charging the adversary or discharging himself. We will illustrate. Suppose a suit brought on a promissory note and the plea is payment. The plaintiff's first evidence will be the note, which when put in charges the defendant. If, however, the latter proves by certain witnesses that on a certain day he paid the plaintiff the amount due, which was accepted by him in satisfaction of the note, he may safely rest, for he has discharged himself. Then the plaintiff may call witnesses who impeach those of the adversary, and others who prove an admission by the defendant that the payment mentioned was to be applied to another purpose; and thus the defendant is charged again. The defendant may next contradict or explain away the admission, and strengthen his proof of the payment of the note, thus discharging himself the second time. And the course of the evidence may go through further alternations of charging and discharging.

Each adversary must at every stage make his evidence so strong before he rests that, if it be assumed to be true, he is entitled to the verdict. This is always the leading

object to the direct examiner, whether he is counsel for the plaintiff or the defendant, and at whatever stage or turn of the evidence he may be. And the testimony of every one of his witnesses is to be regarded only as means to attain this object. This is the wise counsel of David Paul Brown, who in one of his Golden Rules says that counsel should never ask a question without an object, nor without being able to connect that object with the case, if the question is objected to as irrelative; and in another: "Never begin before you are ready, and always finish when you have done. In other words, do not question for question's sake, but for an answer." Of course it is clear that these rules apply to all examinations. You should have a rightly intelligent purpose in every question, whether you are dealing with your witnesses or those of the adversary. To return to the examination in chief, the exact understanding of the real end of the introduction of testimony will always show the counsel how to shun the useless, irrelevant, or hurtful, and to avoid pausing too soon. Now and then he must go further than he intended at first, because of surprises by conflicts among his witnesses, or the development of adverse facts in cross-examination. But he will always make out his case before he rests, — that is, if his evidential resources are sufficient.

§ 388. We hope that we have adequately opened the main subject of this chapter to the young lawyer. In case we have failed, its superior importance will become plain to him after a while, if he has formed his own opinions by observing the courts for himself, instead of accepting the errors of Quintilian and the English writers, who ignore the fact that witnesses are generally truthful, self-possessed, and honest, and who exaggerate the average achievement

of cross-examination. He will then find that in almost every trial the verdict turns on facts which have been disclosed under the direct examination of either the plaintiff's or defendant's witnesses.

§ 389. Especially train yourself to see the real bearings of every one of these potent facts and to bring them out completely; and bring them out in a way to strike the attention of the jury. Here comes in appropriately the ninth Golden Rule of David Paul Brown:—

“Speak to your witness clearly and distinctly, as if you were awake and engaged in a matter of interest; and make him also speak distinctly and to your question. How can it be supposed that the court and jury will be inclined to listen, when the only struggle seems to be whether the counsel or the witness shall first go to sleep?”

CHAPTER X.

CROSS-EXAMINATION.

§ 390. AFTER the party calling the witness, whether he be plaintiff or defendant, has examined in chief, the other can cross-examine. And he should at first consider whether he should examine at all. The witness may be too plain-spoken, honest, and steady, and you may exactly understand his narrative and apprehend nothing but aid to the other side from any question that you may ask. Many times it requires great self-mastery, when the witness is turned over to you, to announce immediately that he may retire. This announcement should always be made, unless you have good reason to expect no damage or some benefit from exercising your right to question. I note that the wary veterans of the courts cross-examine less and less as they grow older in practice. By the multitude cross-examination is as much overrated as advocacy. Sometimes a great speech bears down the adversary, and sometimes a searching cross-examination turns a witness inside out and shows him up to be a perjured villain. But ordinarily cases are not won by either speaking or cross-examining. The tyro's conception of the purpose of the latter is that it is to involve every adverse witness in an inconsistency or self-contradiction. But you will often see a dozen consecutive cases tried wherein no witness who is game for

the cross-examiner makes his appearance. It is only the profligate who swear falsely; and if not the profligate, it is the extremely heedless who make such glaring blunders and mistakes as to destroy the credit of their testimony.

§ 391. These cautions are placed in the forefront of the chapter, to be meditated before the student comes to the places farther on, where copious use is made of the writings of Mr. Cox and Mr. Harris, who, while giving very valuable instructions, yet hurtfully exaggerate what can be effected by cross-examination. Mr. Cox says, "There is never a cause contested, the result of which is not mainly dependent upon the skill with which the advocate conducts his cross-examination."¹ In Mr. Harris's Hints it is implied in a few passages that there are witnesses who cannot be shaken, yet the bulk of what he says and his chief stress are in dealing with those whose direct testimony is overturned by the questions of the adverse counsel; and consequently the most careful reader infers that he thinks cross-examination can be made to do wonders in almost every case. Long ago Quintilian gave the subject a somewhat better treatment,² which has been highly applauded by different English and American writers. But the doctrine of the current books of the day lags behind the prevailing practice of the best lawyers. This doctrine is that of Mr. Cox and Mr. Harris, as indicated above. It is utterly misleading; for it is generalized from exceptional instances, and takes hardly any account of the kind of witnesses whose testimony wins more than three fourths of the verdicts in our courts.

¹ Advocate, 434.

² In the famous seventh chapter of the Fifth Book of his Institutes. It is very readable in Watson's translation.

§ 392. The practice and judgment of Scarlett, the great English lawyer who lost fewer cases than he ought to have won and won more than he ought to have lost than any other hero of legal biography, outweigh the opinions of the authors mentioned. While he avoided the oratory which draws people to hear, intent as he was only upon the argument of the governing facts, it was his custom rarely departed from merely to probe his adversary's witnesses for further proof of his own case, scorning to waste his time in badgering them by an examination more entertaining to visitors than effective with the jury. He says in his Autobiography: "I learned by much experience that the most useful duty of an advocate is the examination of witnesses, and that much more mischief than benefit generally results from cross-examination. I therefore rarely allowed that duty to be performed by my colleagues. I cross-examined in general very little, and more with a view to enforce the facts I meant to rely upon than to affect the witness's credit,—for the most part a vain attempt."¹

§ 393. Having premised as above in order to protect the student against prevalent errors and to foreshadow to him the main end of cross-examination, we will now pursue our subject. And we adopt the plan followed in the

¹ Memoir of Lord Abinger, 75. See American Law Studies, §§ 1076-1096, for a sketch of Lord Abinger.

Compare the following, in which an English lawyer of the present day expresses similar views: "The object of cross-examination is not to produce startling effects, but to elicit facts which will support the theory intended to be put forward. Sir William Follett asked the fewest questions of any counsel I ever knew; and I have heard many cross-examinations from others listened to with rapture from an admiring client, each question of which has been destruction to his case." Sergeant Ballantine's Experiences, 1st Am. ed., 106.

last chapter; that is, we begin with average witnesses, and we award due prominence to the methods most common in actual practice. How to handle such witnesses and the mastery of the methods just mentioned is the first and most important lesson of all to the cross-examiner. The exceptional and unusual will afterwards have proper treatment as such, instead of being placed in the foreground and given an undue conspicuousness.

§ 394. Perhaps the most important thing for you to know is the character of the witness. No man can tell a long story with complete consistency. An expert cross-examiner can detect in the most credible testimony trivial conflicts which do not weigh much. Witnesses stand mainly on their characters. He who is reckless or careless of the truth, or otherwise bad, is known as such. Such a man if he is not telling the truth can be easily put down when he is given to the opposite counsel. But the jury will only be irritated at a persistent attack on a witness of good standing. Let the cross-examiner therefore attend most to one thing not mentioned by Mr. Cox, and greatly slighted by Mr. Harris, — the character of every witness.

§ 395. Next we must emphasize the importance of previous acquaintance with the narrative of the adverse witnesses. The English writers noticed above in this chapter seem to assume that you start with only the knowledge which the answers to the direct examination have imparted. But, as we have already advised you, it is your business to have found out, if possible, a great deal more. If others beside your client or his witnesses were present when something occurred which is material to the case, you can easily learn before the trial who are these others, and by prudent inquiry you can also learn what will

be their testimony. And thus you will be the better able to cross-examine properly, making the adverse witnesses support your side without supplying the omissions which possibly your hasty opponent has committed. For instance, one who proves an alleged cause of action may know of a valid *ex post facto* discharge, which, if elicited by you, turns him into a witness of your own. If you are unaware that you can prove this material fact by this particular witness, you may not prove it at all.

This is a very incomplete presentation of what you should learn beforehand. Before the chapter is finished it will be apparent to you that you ought to exhaust all possible means in order to be forewarned of every particular by which you may draw helping proof from the opposite witnesses, or break them down if need be. There are many effective cross-examinations which are purely extemporaneous, but they will nearly always be the better for preparation and premeditation.

§ 396. We will treat the subject of this chapter under the following scheme, which is its natural classification. You cross-examine these three classes:—

1. The witness whose version you accept so far as it goes.
2. The witness whom you show to be mistaken, or the force of whose testimony you take off by other means, not however attacking his veracity.
3. The witness whom you show to be unworthy of credit.

We add that there are really but two kinds of witnesses, the truthful and the untruthful; and consequently there are at bottom but two kinds of cross-examination, the one intended to elicit friendly evidence, and the other to

show the unreliability of the witness. We wish to impress it upon our student that the first kind is in general use in every sort of case, while the second is only of occasional importance.

§ 397. We now take up the witness mentioned in the first class of our enumeration, that is, he whose version you accept as far as it goes. Your objects with him are but two, the first to have him complete what the direct examiner has incompletely presented through such partial questions as will be explained in a moment, and the second to make him, if you can, re-enforce your own proofs.

§ 398. The examiner in chief is privileged to ask such relevant questions as he pleases, and to keep the witness from answering anything more. He generally culls from what the latter knows of the matter in controversy such parts only as are favorable. He does not choose to help you by proving facts supporting your side. This suggests what we may term the cue for your beginning. An artful direct examination may pare down the testimony of a bystander and have him to narrate nothing but that he saw the prisoner deal a fatal blow to the deceased. If the investigation stops here a presumption of the guilt of murder is raised against the prisoner. But if your cross-examination draws out from the witness that there was a justification of the blow, or that it was immediately preceded by very great provocation, and other facts rebutting malice, your client may be entitled — even upon the testimony of the State's witness — to an absolute acquittal, or to a conviction of an offence less than murder. If you observe the trial of issues of fact, you will note that nearly every witness is made to suppress some important parts of a transaction while replying to the direct examiner; and that

often, where he is given free range by being told to make his statement in his own way, he omits some details which would aid the other side should they be proved.

§ 399. To make the witness give a complete narrative, if what has been kept back is favorable to your side, may be regarded as the point where cross-examination should generally begin. Of course you do not want to ask questions which will give further advantage to your opponent. If you are discreet and have had some experience you will usually be prompted rightly by one or more of the following particulars.

1. Previous information as to the expected testimony of the witness. We always insist that you should come to the trial with full knowledge, as far as possible, of all the favorable and unfavorable proof that can be made by the adverse witnesses.

2. The natural probabilities of the transaction. We may make our last illustration do service again. Should a witness of whom you know nothing merely say that he saw a mortal stroke given, you may be almost sure that there was at least some provocation for it. And your adversary's brevity of interrogation gives you good reason to suspect that he recoils from something which this witness can tell. Even a child is often heard to question with accuracy according to probabilities. They now and then give a profitable suggestion to the direct examiner, who has often listened to the witness in the office. To the cross-examiner who has imperfect knowledge or none at all of what the witness will testify they are far more important. You can sometimes destroy the credit of a witness by making him testify to something grossly improbable, but the point we are now urging is that average

witnesses generally answer that which is probable. What appears to be very probable you will generally be safe to ask for in the cross-examination of an honest witness.

3. If the witness is friendly to your client, or to his friends and relatives, you may always hope for some comfort from him. It is however to be noted here that where the opposite witness is a friend to your client everything that he will testify can usually be ascertained in advance.

4. The manner of the witness. While under direct examination he may show a reluctance to testify against your side, or when you begin a bias towards your cause may appear. Here you will nearly always elicit something of advantage if you will but give him opportunity to say it. As a rule you may proceed boldly. But if he stands evenly balanced and neutral, you will generally do well to ask concerning such details as the strong probabilities suggest to be in your favor. Such a witness, after a searching direct examination has drawn out of him all that is against you, will often take pains to maintain the appearance of impartiality by telling as much more for you if you will lead him over the transaction again and question in support of your theory.

Further, as suggested by Mr. Cox, "A witness who is conscious that he has been induced by the encouraging examination of his counsel to say too much is often ready to seize the opportunity afforded by cross-examination to modify his assertions by qualifications and explanations. If you see this tendency, which is usually shown at the beginning, you have only to encourage it by falling in with his mood and carefully avoiding anything calculated to make him fear the use to which you may put his admissions."¹

¹ Advocate, 385.

§ 400. When your evidence is but slight and that of the other side is very strong, you may be reckless in spurring his witnesses to make a complete statement. Your case is so bad that any change in it may be for the better. We add an entertaining and apt illustration.

"Some time ago the writer while waiting in court watched the trial of a case where the plaintiff sought to recover damages for a breach of warranty. The defendant had sold him a horse with an express warranty that he was sound and kind and free from all 'outs.' The next day the plaintiff noticed that a shoe was loose, and he undertook to drive him into a blacksmith's shop to have him shod, when the horse exhibited such violent reluctance that he was obliged to abandon the attempt. Repeated efforts made it evident that he never would be shod willingly, and therefore he was obliged to sell him. The defendant called two witnesses. The first, an honest, clean-looking man, testified that he was a blacksmith, that he knew the horse in question perfectly well, and he had shod him about the time referred to in the plaintiff's testimony. 'Did you have any difficulty in shoeing him?' asked the defendant's counsel. 'Not the least. He stood perfectly quiet. Never had a horse stand quieter.' The other, a venerable-looking man, with a clear, blue eye, testified that he had owned the horse and that he was perfectly kind. 'Did you ever have any trouble about getting him into a blacksmith's shop?' 'Well, sir, I don't remember that I ever had occasion to carry him to a blacksmith's shop while I owned him.'

"The plaintiff's counsel evidently thought that cross-examination would only develop this unpleasant testimony more strongly, so he let the witnesses go. The jury found

for the defendant. The next morning, as the writer was sitting in court waiting for a verdict, a man behind him, whom he recognized as the blacksmith, leaned forward and said, 'You heard that horse case tried yesterday, did n't you? Well, that fellow who tried the case for the plaintiff did n't know how to cross-examine worth a cent. I told him that the horse stood perfectly quiet while I shod him; and so he did. I did n't tell him that I had to hold him by the nose with a pair of pincers to make him stand. The old man said he never took him to a blacksmith's shop while he had him. No more he did. He had to take him out into an open lot and cast him before he could shoe him.'"¹

Of course the plaintiff's counsel should have been more searching in the examination, where he could not possibly have made his own case worse.

§ 401. We give another instance. A man driving a buggy collided with a railway train at a crossing, and he brought suit. On the trial a servant of his testified, and told the facts so strongly in his favor that it seemed useless to cross-examine. But the defendant's counsel, who had no information as to the witness, submitted him to a skilful tentative sifting. At last he fished it out that the mule which the master was driving when he received the injury stated in his declaration had once borne the name of Bill, and the plaintiff had himself changed it to Staver. This revealed to the counsel his true defence; and acting on the hint he got a verdict for the road upon the ground that the plaintiff was driving what he knew to be an unsafe animal.

We here leave this part of the subject by urging you to

¹ American Law Review, X. 153.

be always on the alert to prove in your cross-examination the whole truth of the matter which the select questions of your adversary has garbled to suit his purpose.

§ 402. The second sort of cross-examination is closely allied to the first. It is intended to weaken the force of the testimony drawn out by the direct examination and prepare the way for your own evidence, or it may serve to show that the witness is mistaken. We add some illustrations.

§ 403. A master one morning at breakfast suspected that there was poison in his coffee, and he immediately accused his cook. The negro was thought to evince manifest signs of guilt. The whole family showed alarming symptoms, and the master in his rage made the cook drink all the remaining coffee. She fell into convulsions. Of course it was poison. They all saw in the coffee-grounds fragments of the fatal buckeye. The doomed slave was hurried through an examination. A lawyer, whose heart went out in yearning love to the poorest and lowliest in distress, inquired into her case and quietly learned all of the testimony against her. Every one who had drunk the coffee had sworn to its unusually bitter taste. It chanced that our lawyer had been lately prescribed by his dentist a decoction of buckeye for toothache, and he knew that its taste was sweet and not bitter. He was too prudent to proclaim his dissent, for, the infuriated family learning, the mob might have balked him. He waited until the trial, when he volunteered to defend the friendless woman. The court of course assigned him to her as counsel. He made all of the witnesses for the State dilate upon the bitterness which they had testified to at the examination ; he almost made them quarrel with him by appearing to doubt

what they said on this point : bitter-tasted the coffee was ; they had never tasted anything so bitter. His only evidence was a glass of fluid, proven by the dentist — a man well known to the jury — to be a decoction of buckeye. The glass was handed to the judge ; he tasted ; then to the jury, and all of them took a timid sip ; and in a few minutes there was an acquittal. The bitterness had no doubt been the result of negligence with the coffee-pot and fright had caused the convulsions of the cook. Witches however have been burnt, and other women both bond and free have been convicted on evidence less satisfactory than that produced against this slave before the magistrate, and, with sadness be it said, executed. This great advocate had often delivered prisoners from the dread penalty, and his name was in all men's mouths for his matchless tact and unrivalled eloquence. But to his immortal honor be it told that he ever counted his unfeared and unostentatious defence of this helpless slave among the proudest of his victories.¹

§ 404. The following is related by David Paul Brown.

“ A young and interesting girl, of respectable position, had trusted and been betrayed. She became a mother. At the age of three weeks the child died somewhat suddenly. A *post mortem* examination took place. The death was said to have been produced by arsenic, and the medical witnesses strengthened that opinion by testimony. The mother was indicted for murder, and was tried before Judge Symser, of Montgomery County, a humane and industrious and eminent judge.

“ In addition to the scientific evidence and in strong

¹ The late Hon. A. H. Stephens, to whom for many years I mentally applied Horace's “ *Insigne maestis praesidium reia.* ”

corroboration of it, it was shown that a day or two before the death of her infant the mother had sent for half an ounce of arsenic to a grocer's; that after the death the arsenic was taken to the grocer's and weighed, and had lost twenty-four grains in weight. This circumstance together with the opinion of the chemist, presented a strong case. Neither was sufficient in itself, but together they were dangerous. Of course the cross-examination as to the weight was very rigid and severe. Upon this particular point it ran thus:—

“‘When the arsenic was purchased, how did you weigh it?’

“‘I weighed it with shot.’

“‘How many shot?’

“‘Six.’

“‘Of what description?’

“‘No. 8.’

“‘When it was returned to you, did you weigh it in the same scales?’

“‘Yes.’

“‘Did you weigh it with the same shot?’

“‘I weighed it with shot of the same number, for I had no other number.’

“‘How much less did it weigh?’

“‘Twenty-four grains less.’

“It was plain that the testimony bore hard upon the prisoner, but at this stage of the case the court adjourned. Immediately my colleague (Mr. Boyd) and myself visited the stores of all the grocers and took from various uncut bags of No. 8 the requisite number of shot, subjected them to weight in the most accurate scales, and found that the same number of these different parcels of shot varied more

in weight than the difference referred to as detected in the arsenic at the time of its return. The shot, the grocers, the apothecary, the scales, were all brought before the court. They clearly established the facts stated."¹

§ 405. In both the last instances the testimony of the opposite witnesses was fashioned by the adversary into such shape that it was easily overborne by counter evidence. This achievement is common only with the able and experienced lawyer. A large proportion of cases calls for it. The student should study and exercise himself in this subdivision of the general subject of cross-examination with great pains. Efficiency in it postulates a quicker and deeper insight, greater art of demonstration, and more practice than are commonly needed elsewhere. You have to discern that what appears good proof to everybody else is really not so, and you must in addition have full command of the means to develop its unsatisfactoriness so clearly that the jury will cast it aside.

§ 406. There are some things which so frequently affect testimony unfavorably that they deserve a word here. We may mention bias first. Relatives and intimate friends; classes in society arrayed against one another in feeling, as whites and negroes in the South, or members of different religious denominations and political parties all over the country; the employee where his master is touched; — we need give no more hints of the bias which the cross-examiner can often bring forth to his benefit. Of course he will not overlook the warping influence of interest. And there are other influences which lead a witness into errors. He may have looked in a bad light, or he may in even a good light have confounded one thing or person with another

¹ Forum, II. 455.

similar. The cross-examiner ought to make conspicuous all the existent causes which either diminish the weight of even very positive and confident testimony, or show it to be utterly unreliable although those who gave it may be of excellent character.

§ 407. Our next stage is the cross-examination intended to prove that a truthful witness is mistaken. We begin by giving some pertinent passages from Mr. Cox : —

“A sober quietness, an expression of good temper, a certain *friendliness* of look and manner, which will be understood although it cannot be described, should distinguish you when you rise for the cross-examination of a witness the truth of whose testimony you are going to try, not by the vulgar arts of browbeating, misrepresenting, insulting, and frightening into contradictions, but by the more fair, more honorable, and more successful if more difficult method of showing him to be *mistaken*. You must begin with conciliation ; you must remove the fear which the most truthful witness feels when about to be subjected to the ordeal of cross-examination. . . .

“Perhaps it is unnecessary to inform you that it is useless to put to a witness directly the question, if he is sure that the fact was as he has stated it. He will only be the more positive. No witness will ever admit that he *could* have been mistaken. . . .

“The witness has detailed an occurrence at a certain time and place, and it is your purpose to show that he was mistaken in some of the particulars, and that the inferences he drew from them were incorrect or not justified by the facts. Your first proceeding, to this end, is to *realize the scene* in your own mind. Your fancy must paint for you a picture of the place, the persons, the as-

sociates. You then ask the witness to repeat his story. You note its congruity or otherwise with the circumstances that accompanied it; you detect improbabilities or impossibilities. You see as *he* saw, and you learn in what particulars he saw imperfectly and how he formed too hasty conclusions; how prejudice may have influenced him; how things dimly seen were by the imagination transformed into other things in his memory.

“How erring the senses are and how much their impressions are afterwards moulded by the mind, how very fallible is information seemingly the most assured, it needs no extensive observation to teach. If you make inquiry as to an occurrence in the next street ten minutes after it happened, and from half a dozen actual spectators of it, you will receive so many different accounts of its details, and yet each one is positive as to the truth of his own narrative and the error of his neighbor’s.”¹

§ 408. The doctrine of the quotation just made is good in the main, but we must reflect upon it in two or three particulars. In the first place it is not our experience that a witness will never admit that he could have been mistaken. It is true that many of them are over-positive, but it is also true that many are not, and will frankly confess that they may be in error in material points. The extreme of this class disgusts the counsel on both sides by lack of certainty as to any fact. The cross-examiner must turn him to good account if he can.

Our next remark is that it is generally a blunder for the cross-examiner to begin by having the witness to repeat his story. He should grasp it as it is first told. He may, if it suits his purpose, pursue its order in touching

¹ Advocate, 396-399.

upon omitted details ; but generally, if he is trying to show a mistake, he can only succeed by proceeding from his own standpoint, which is necessarily different from that of your adversary.

The last thing we have to say is that the uncertainty of average testimony is made too great. Should a dozen good lawyers selected promiscuously hear the conflicting accounts of "an occurrence in the next street ten minutes after it happened," supposed by Mr. Cox, all or a large majority of them would at once come to the same conclusion, unless it was a most unusual affair. And that conclusion would not necessarily be exactly the version of any particular witness. It would be reached according to certain laws of human belief, and it would generally tally with the greatest probability of the matter. Such a probability is always of importance to the trial counsel, and it is specially of importance when he is cross-examining for the detection of mistakes.

§ 409. Sometimes you may have the mistake corrected on the stand. A half-dozen witnesses, summoned to prove a lower value of a parcel of land applied for as an exemption, were ordered out of court when the trial commenced at the instance of the creditors, who alleged a higher value. When the first was called in, he answered that the land was worth only eight dollars per acre. On the cross-examination he was asked how did it compare in quality and value with that of A, of B, of C, and so on through a round of many plantations in the vicinity. He made the land in question a little better than the neighboring parcels inquired about. He was then interrogated as to sales of these parcels within the last four or five years, and he had to admit that twelve dollars per acre was the lowest price

that any one had brought, and that the whole of the land sold averaged about fifteen dollars per acre. When he answered on his examination in chief that the land was worth only eight dollars per acre, being a planter, he gave as his reason that he considered no lands in that region worth more for farming purposes. But being asked by the adverse party if it was not worth what it would command in the market he answered affirmatively, and he admitted that it would probably bring eighteen dollars per acre if sold. Every one of the other witnesses was dealt with in the same way, and with a similar result.

It was at a time when witnesses and jurors in the South sympathized almost without exception with the debtor whose interest it was to undervalue the property he sought to exempt, each one apprehending that he might soon need a homestead for the shelter and subsistence of himself and his family; and the success of the cross-examination was due to a careful study of the different sales mentioned.

§ 410. We give another example from the practice of a celebrated lawyer. Action for a cargo of goods sold on credit. Plea, that plaintiff had represented the goods to be merchantable, and that defendant, relying on the representation, had bought and shipped the goods to a foreign market, where he suffered great damage because they proved to be unmerchantable. The main witness for the defence appeared to be reliable. He had been employed in the ship that carried the goods, he explained how they were made of bad material, not fit for use, and he alone testified to the false representation alleged. The counsel who had brought the action and prepared the case said to Choate, whom he had called in at the last moment, that the witness was inventing. "No," replied the leader, "he is

truthful, but mistaken." He begun his cross-examination by establishing a friendly understanding. He made the witness report the appearance of the seller of the goods as to size, dress, complexion, and whiskers. The picture given was so unlike the plaintiff that it became manifest he had a different person in mind. When he was made to name the ship, the plaintiff easily proved that his goods were sold two weeks later and shipped in another vessel ; whereupon the defence collapsed.

At the beginning of the trial, Choate, noticing the indignation which the defence excited in the plaintiff, said of him to his associate, "He is honest, and we shall find our way out of the scrape." The certainty with which he discerned the honesty of the plaintiff and the witness at the first glance made him see that the only possible explanation of their apparent conflict was that the latter had mistaken a seller of other goods for the former, — a solution which had not occurred to the associate, who had had sole charge of the plaintiff's case until the trial.¹

§ 411. We come now to what is practically the most effective and most widely useful of all the different sorts of cross-examination. In it you have the opposite witness to prove independent facts in your favor. Much of the interrogation considered above in this chapter is palpably prompted by the answers to the direct questions and other things occurring in court, but here it is more necessary that you have learned beforehand how the witness can benefit your client. Of course where you have no special information you will attend to all proper suggestions, such as strong probabilities, hints in his replies to your adversary, and disclosures as to the transaction by others. A

¹ Neilson, *Memories of Rufus Choate*, 35-38.

person may have been present when a sum of money was borrowed, and he may also have seen the money repaid afterwards to one who is claimed to have been the agent of the lender to receive it. If this witness testifies for the plaintiff on the trial of a suit for the money, his counsel will ask nothing about the repayment. He may not even know of it. But you have been told of it by your client, and you therefore will draw it out when you take the witness. Possibly the authority of the person to receive the money may be controverted, and you can prove by this witness either the admission of the plaintiff or such conduct on his part as shows this person to have been his duly authorized agent. In this instance your cross-examination really turns the witness into one of your own, and makes him defeat the plaintiff's case. It is apparent that you would hardly ever suspect the existence of this favorable evidence, had you no information but the answers in the direct examination; and perhaps this decisive proof for your client can be made only by this particular witness. Thus is indicated the great importance of previously acquired knowledge of what can be proved by the witnesses of your adversary.

§ 412. Note the usual cross-examinations by good practitioners, and you will find that in a large proportion they ask hardly any questions except such as are now our special subject. In most cases they see intuitively that there is no very distorted statement to be rectified, and that there are no serious mistakes to be corrected; and they only make the witness re-enforce their side as to some detail. And this is the very strongest evidence. As it comes from the adversary's witnesses he cannot discredit it, and besides it seems to the jury to have the force of an admis-

sion against interest. While the kind of cross-examination now in hand is the most important of all, it is also the most easy. It requires no great skill. It will generally be well done if with patience you have had your client and his following to tell you all that the witnesses for the other side know in his favor, and you then question accordingly.

As we leave this branch of the subject, we must ask you not to fall into the error of rating its place in practice by the short notice it has received from us. It is too simple to need much explanation. But if you stay at the bar you will have increasing use for it, and after a while you will, as a general rule, prepare no other sort of cross-examination for the average witness. It is a larger field for your powers than appears at first. The cross-examiner requires much attention and assiduity to collect from the opposite witnesses all the help possible. It is not only such important facts as we used for illustration in the last section that he must search for. They would be overlooked by only a very dull man. He is to exhaust many details; such as strengthening one of his own witnesses stoutly attacked by having the witness under examination to concur with him in even a small matter; the conduct, expression, or language of the adverse party on some occasion which the latter has probably forgotten; minute circumstances, such as the shapes and positions of marks;—in short, the details relevant here are as varied and extensive as the entire possibilities of proof. In addition to the gift of common sense, quick insight into persons and affairs, great familiarity with the case, and profound meditation of the testimony, are needed in order to qualify one to bring out from the adverse witnesses all the large and trivial

facts which establish his case without at the same time making the other side stronger.

§ 413. In the foregoing we have been mainly treating witnesses of whose probable answers to the direct examiner and what they can testify in your behalf you have at least some information before the trial. But now and then you are confronted with a witness of whom you have learned nothing except from his testimony in chief. We must give you a word of counsel how to handle him. You must first decide according to all the *ex tempore* suggestions—the character of his statement, his manner, the manifest probabilities, the nature of the evidence on both sides already out or which is still to come, etc.—whether you will have him complete what you deem is a fragmentary statement, or examine to take off the force of his testimony in other respects.¹ You should next make trial of him to see if he can be of other use. If you have attended closely to his answers to the adversary, you may have caught glimpses of favorable facts which you can now draw from him. And you may feel for others. An experienced lawyer shows great artfulness in these matters. He will often elicit nothing of account, and yet the skill with which he fishes for the favorable and avoids the adverse gains credit for his cause.

§ 414. If the unknown witness is found to be frank and honest, you can easily drain him of all support. But suppose he is otherwise, and you have cause to believe him unworthy of credit. You can quickly test him. There are witnesses, perhaps on both sides, who have given truth-

¹ As to this subject of cross-examination without previous preparation, see *ante*, §§ 399, 410. It finds much illustration in the rest of the chapter.

ful versions of the same matter which he has not heard, and he may tell a different tale; or he may be made in advance to contradict strong evidence which you hold in reserve; or he may be led into the utterance of gross improbabilities, especially if he manifests a strong adverse bias. You must not too hastily decide that he is lying. If you make a serious blunder, you will have the jury to disagree with you and rally to his defence. In most cases you are guided to the truth by the most palpable revelations, by answers of some one present to the inquiries of yourself or associate as to the character of the witness, or by an instinct which becomes almost infallible in practice. When you have properly settled it that he is not veracious, of course he belongs to the next class in order.

§ 415. We have now gone through with the cross-examination of the witness whose character you do not attack. Whether you have him to supply, as to a particular affair inquired about, what your adversary has avoided; or you blunt the edge of his answers in chief by showing him to be mistaken, or in other ways we have mentioned; or you lead him to establish some of the material allegations of your pleadings, — it has the same object and really the same quality. You make an ally of the witness, and you make him — to use the phrase of Scarlett quoted above — enforce the facts on which you rely; and this enforcement is, according to the great authority just named, the practitioner's main and most usual business with the opposed witnesses. If he generally succeeds in attaining the objects pointed out in this section, he is really an efficient and able cross-examiner, even though he never tries to make a witness contradict himself.

§ 416. We have reached the point where we must take

up the witness whom you intend to discredit. While this is the most unimportant branch of the subject, it yet requires much space for complete treatment. We begin with the questions which prepare for impeachment. Here you ask him if he has not said so and so at a certain time and place to a particular person whom you name. This statement which you ask if he has made is one materially different from that in his direct examination. Should he deny making the statement you will contradict him by the person to whom it was made. If the latter is of good standing, the jury will generally disregard the testimony of the witness. But when you cross-examine as to the extracurial statement the witness may admit that he made it. He thus confesses that he has told one lie concerning the matter under investigation, and the jury ask themselves how can they know that they have not heard him tell others in the rest of his testimony. As a general rule you should question him no further on this particular point after you have elicited his admission. Whatever explanation he can make of the inconsistency, leave to your adversary to produce in the re-examination, when it will not usually have one half of the weight with the jury which it would have had if you had given opportunity to make it. The blunder which we have just cautioned against is often committed, especially by inexperienced counsel.

§ 417. As to the attack mentioned in the last section, we must note that to be effective it should be in a material matter and the difference insisted upon in the two accounts must also be material. We must further urge on you that in the preparation of the case you should take pains to find out as well as you can what will be the testimony of every adverse witness, and be always on the look-

out for contradictory statements made to people of good repute. Even if your preparation has failed to detect any such, by keeping an eye about you during the trial you may at the very last moment catch your prey in the net.

I have noted that the longer the final trial of an exciting case is deferred, the more the resources of contradiction multiply. The influence, canvassing, and entreaty of the parties and their friends cause many of the reports given at first to be modified in their interest. It ought to be your concern to make as much as possible for your side out of this tendency. And there should be on your part well-directed efforts to collect the available counter testimony, from the beginning of the preparation until the call of the last witness against you.

§ 418. There are often frequent trials of the same case, or of issues involving substantially the same facts, wherein a particular witness on the other side may have testified several times, or he may have been examined by commission. Whenever his testimony varies decidedly from that which he has previously given and it is your cue to attack his credibility, you should never fail to take advantage of it. For such a contradiction is of more moment because he has sworn to both statements. It is much more easy to take off the usual effect of an inconsistent statement hastily made than that of one which is deliberately given under oath. I have once or twice heard the latter satisfactorily explained, but such occurrences are very rare.

§ 419. The next mode of attack is to draw the witness into such statements as will be disproved by the other testimony. You may put him on some important detail in irreconcilable oppugnancy with all the fellows of his own side, as well as with your own evidence. This is a more

subtile task than the questioning which lays the foundation for proof of counter statements made out of court. You must discipline yourself to carry in your head, with such distinctness as to make mentally an accurate comparison, both the direct answers of the particular witness and all the other testimony, — that which is already out, and that which may reasonably be expected from both sides. If he is reckless and defiant in his partisanship, you need not be very careful to veil your purpose. But if he is shrewd and vigilant to shun your snares, you must take pains not to wake his caution. I have noted that when you wish to touch on many different details you fare better if you adopt rapid and disconnected interrogation, — where you will often be seriously disadvantaged if you have to wait upon a long-hand reporter, — and that when you need to expand a particular matter very fully it is generally well to fall in with the witness and seemingly accept his narrative. And whatever course you take, and whether the range permitted you be wide or contracted, do not overlook a single opportunity, and be unwearied in exhausting all possibilities of placing him in opposition to the other testimony.

We have noted that the particular subject of this section is not sufficiently attended to in practice. The counsel show that they have some conception of its importance, but usually they do not thoroughly measure the witness in hand by the other testimony, and consequently their development of his disagreement with it falls far short of what is achievable.

§ 420. We must in this place observe upon the duty of the cross-examiner to unfold conflicts in the adverse testimony. Quintilian says: "Fortune sometimes favors us

by causing something to be said by a witness that is inconsistent with the rest of his evidence ; and sometimes (as more frequently happens) she makes one witness say what is at variance with the evidence of another ; but an ingenious mode of interrogation will often lead methodically to that which is so frequently the effect of chance.”¹ To throw doubt on the adversary’s evidence is often your entire resource ; as where you rely on the general issue for the defence—especially in criminal cases—and also where you are for the plaintiff who has cast the onus incontrovertibly on the defendant and the latter is trying to shift it. In all of these instances, if you cause the adverse witnesses to collide upon a cardinal point it may prove decisive in your favor. The same accurate understanding and collation of the testimony as we saw to be required when you would have a particular narrative disproved by the other evidence are likewise necessary here. And the discrepancy must be as patiently and satisfactorily made out.

§ 421. Next to actual information as to what the testimony of the different witnesses will be, the most effective means at your command to make them contradict one another is to have them ordered out of court. It is a privilege which need not be always exercised. I have noted that it is usually well to exercise it when you are suddenly called to defend some exciting charge of crime. The question should be well considered and settled before you announce that you are ready to try.

The following is an instance of an important difference developed by the means just mentioned. The State was striving to identify a particular defendant as one of the perpetrators of a deed of violence by tracking a horse

¹ Institutes, V. 7. 29.

alleged to be that which he usually rode from the place where the crime was committed to his dwelling, which was a few miles distant. The counsel for the defence acquainted himself well with the road which the horse was reported to have gone. About a mile from the scene of the violence the passengers had made a new road, which turned about in the open fields and woods to avoid some broken places in the highway, and which returned to the latter about half a mile from the point of divergence. Two witnesses were to testify to tracking the horse. They were ordered out of court, and afterwards, on examination, one tracked the horse along the old road, the other along the new road, and both swore that they were together at the time.

§ 422. The better the character of the witnesses for truth and coolness, the less you will make by ordering them out of court. If they come from their confinement to the stand and one by one tell in the main the same tale, varying only in those common discrepancies which are but proof that there has been no collusion between them, the effect is very damaging upon your case. You have been caught in your own trap. You may note that generally a false alibi is detected and a true one established by having the supporting witnesses ordered out of court.

§ 423. You may not be able to lead the witness into a conflict with any other witness, and yet you may commit him to assertions which will finally prove the ruin of his credit.

A lawyer undertook the defence of a negro charged with the murder of a white girl, who had been found dead, the signs on her person indicating that she had been ravished. The evidence against the defendant was purely

circumstantial, but it was thought conclusive by the people. The lawyer had his own reasons for believing his client innocent, and that the guilty man was somewhere in the crowd of witnesses who eagerly pressed forward to damn the cowering prisoner. There had somehow been two examinations of the defendant by a magistrate, and the prosecutor had testified in each to tracing the tracks of a man, discovered near the dead body the day after it had been found, to a place where a sudden rain put them out, in a road about a mile from the house of the prisoner, — this road running on by the house mentioned, — and that he thought it useless to go further, as he then knew who the murderer was, meaning the prisoner of course. This opinion was not legal testimony, but the lawyer decided not to object to it, and to draw it out himself if it did not come out otherwise. We need not tell all of the incidents of the trial. The prosecutor was the principal witness to identify the tracks mentioned as those of the prisoner. The former at the trial, while under direct examination, blurted out the declaration that when the rain came up he was then sure who the murderer was. When turned over for cross-examination, the prisoner's counsel began by repeating his statement that at the time and place mentioned he had become convinced of the guilt of the prisoner, to which the witness with some show of insolence assented. He was then calmly reminded that at that particular time the prisoner had not been apprehended wearing boots which the State claimed to fit the tracks, nor had anybody then detected on his clothing what were alleged to be blood-stains; and the witness was asked to state all of the reasons which he had *at the time the rain began* for believing the prisoner to be the man who had killed the girl. He gave only three; to wit,

the course of the tracks from the body towards the house of the defendant ; a conversation which he had testified to having had with the prisoner about the girl a few months before her death ; and information which had been given him about the same time by her mother of a visit of the prisoner to her house at night. He did not give all of these reasons at once, and readily. He had to be quizzed a long time. It was the purpose of the cross-examiner to have this sifting attended to. He forced upon the witness ample time to reflect, who after many trials gave up and said he knew that he had no other than the three reasons just enumerated. Now for the lawyer's aim in thus committing the witness so irrevocably to the three reasons. He made such a stout defence of an alibi, and he had entangled many of the witnesses for the State into such serious contradictions of their testimony reported by the magistrate, that, when he rested, the State replied with a great array of new evidence. The brother of the prosecutor testified to a threat which he heard the prisoner make against the deceased a few days before her death. In the cross-examination the prisoner's counsel, veiling his design under a throng of questions, got him to answer that he had communicated this to the prosecutor before the killing. The prosecutor's daughter testified to having stolen upon a clandestine meeting of the prisoner and the girl a very short while before the killing. She was led so quietly to tell that she had immediately communicated this to her father that no one noticed it. At last came the prosecutor's wife, who testified that the deceased, in an interview with the witness the day before her death, told her that she expected to meet the prisoner on the morrow in the field where she was found dead. She was made

likewise to say that she had told this to her husband the day before the rain. And thus was the prosecutor destroyed; for this rebutting evidence of his own family gave him many more and stronger reasons for believing the guilt of the prisoner, than the three he had stated as all that he had when allowed full time for recollection. In fact, this new evidence, if true, showed that the prosecutor should have lost no time in searching for and following up tracks, and looking for blood-stains, as he did, and that he ought to have known the prisoner to be the doer of the crime as soon as he heard it had been committed. That all this evidence which pointed at the prisoner so unmistakably had not been produced on either of the examinations in which every one of these witnesses had testified, not only generated the conviction that the prisoner was falsely accused at the instigation of the prosecutor, but it re-enforced the attack upon his credit as a witness a hundred-fold. Nobody, not even the judge nor the jury nor sharp-sighted counsel for the prosecution, was aware of the successful attack on this witness until it was clearly shown in the argument, although many had been staggered because the last evidence of the State had not been introduced at first. The poor man's life was saved, and the upshot was that the prosecutor's brother was detected as the murderer.

The demolition of the chief witness for the State was achieved because the prisoner's counsel knew his ground from having premeditated it; and suspecting strongly, as he did, the prosecutor of at least knowing who the murderer was, it was no very shrewd guess of his that the State would reply to his strong defence with other evidence inconsistent with the first, and that the prosecutor

would have to furnish it. And this lawyer, from conning the report of the magistrates, saw that he could involve the adverse witnesses in many contradictions, and he had a presentiment that the prosecutor and his family would return to the stand and be found an easy prey.

It is to be especially noted that some of the testimony was technically illegal. A lawyer often injures his case by stopping an adverse witness of bad character from giving incompetent testimony.

§ 424. You must sometimes try to entrap the witness into such self-contradiction or oppugnancy to known facts as will induce the belief that his testimony is feigned. The following extract from Mr. Cox is full of good instruction upon this sort of cross-examination :—

“Open gently, mildly; do not *appear* to doubt him [the witness]; go at once to the marrow of the story he has told, as if you were not afraid of it; make him repeat it; then carry him away to some distant and collateral topic, and try his memory upon *that*, so as to divert his thoughts from the main object of your inquiry and prevent his seeing the connection between the tale he has told and the questions you are about to put to him. Then by slow approaches bring him back to the main circumstances by the investigation of which it is that you purpose to show the falsity of the story. . . .

“As a specimen of this sort of cross-examination . . . we may name an instance that fell within our own experience.

“In a case of affiliation of a bastard child the mother had sworn distinctly and positively to the person of the father, and to the time and place of their acquaintance, fixed as usual at precisely the proper period before the birth of the

child. In this case the time sworn to was *the middle of May*, and the place the putative father's garden. For an hour she endured the strictest cross-examination that ingenuity could suggest. She was not to be shaken in any material part of her story; she had learned it well, and with the persistence that makes women such very difficult witnesses to defeat she adhered to it. It suddenly occurred to us that she might be thrown off her guard by a question for which she was not likely to be prepared, and the examination proceeded thus: 'You say you walked in the garden with Mr. M.?' 'Yes.' 'Before your connection with him?' 'Yes.' 'More than once?' 'Yes; several times.' 'Did you do so afterwards?' 'No.' 'Never once?' 'No.' 'Is there fruit in the garden?' 'Yes.' 'I suppose that you were not allowed to pick any?' 'O, yes; he used to give me some.' 'What fruit?' 'Currants and raspberries.' 'Ripe?' 'Yes.' This was enough. She was detected at once. The alleged intercourse was in the middle of May. Currants and raspberries are not ripe till June.

"This instance will illustrate our meaning better than any verbal description of it. In this case the woman's whole story was untrue. She had fallen in with the suggestion about fruit, to strengthen, as she thought, the account of the garden; but she did not perceive the drift of the questions, and consequently had not sufficient self-command to reflect that fruit is not ripe in May.

§ 425. "This will serve as an illustration of the manner in which the most acute witness may be detected in a lie. But patience in the pursuit is always necessary. You may be baffled again and again, but be careful never to let it be seen that you are baffled. Glide quietly into another track

and try another approach ; you can scarcely fail of success at last. No *false* witness is armed at *all* points." ¹

§ 426. "If however you adopt the other course, [that is, to show that you suspect him at the first,²] and instead of surprising the witness into the betrayal of his falsehood you resolve to bring it out of him by a bold and open attack, — to *awe* him, as it were, into honesty, — aspect and voice must express your consciousness of his perjury and your resolve to have the truth. A stern, determined fixing of your eye upon his will often suffice to unnerve him, and it will certainly help you to assure yourself whether your suspicions are just or unjust. It may be stated as a general rule, that a witness who is lying will not look you boldly and fully in the face with a steady gaze ; his eye quivers and turns away, is cast down or wanders restlessly about. On the contrary, the witness who is speaking the truth or what *he believes* to be the truth will meet your gaze, however timidly, will look at you when he answers your questions, and will let you look into his eyes. . . .

§ 427. "Thus assured, and pursuing your plan of bold attack, there needs to be no circumlocution, no gradual approaching, . . . but go straightway to your object, plunging him at once into the story you are questioning. Make him repeat it slowly. It will often be that, under the discomposure of your detection of his purpose, he will directly vary from his former statement ; and if he does so in material points which are undoubtedly sufficient to discredit him, it will usually be the more prudent course to leave him there self-condemned, instead of continuing the examination, lest you should give him time to rally and

¹ Advocate, 400, 401.

² Ibid., 400, 401.

perhaps to contrive a story that will explain away his contradictions. If however his lesson is well learned, and he repeats the narrative very nearly as at first, you will have to try another course, which will tax your ingenuity and patience.

§ 428. "Procure from him in detail, and let his words be taken down, the particulars of his story, and then question him as to associated circumstances upon which he is not likely to have prepared himself, and to answer which, therefore, he must draw on his invention at the instant. Some little ingenuity will be necessary on your part after surveying his story to select the *weakest* points for your experiment, and to suggest the circumstances least likely to have been pre-arranged. Having obtained his answers, permit to him no pause, but instantly take him to a new subject; lead his thoughts away altogether from the matter of your main topic. The more irrelevant your queries, the better; your purpose is to occupy his mind with a new train of ideas. Conduct him to different places and persons and events. Then, in the very midst of your questionings, when his mind is the most remote from the subject, when he is expecting the next question to relate to the one that has gone before, *suddenly* return to your first point, not repeating the *main* story, (for this having been well learned will probably be repeated as before,) but to those circumstances associated with it upon which you had surprised him into *invention* on the moment. It is most probable that after such a diversion of his thoughts he will have forgotten what his answers were, what were the fictions with which he had filled up the accessories of his false narrative; and having no leisure allowed to him for reflection, he will now give a different account of the

circumstances and so betray his falsehood. Of all the arts of cross-examination there is none so efficient as this for the detection of a lie.

§ 429. "Another excellent plan is to take the witness through his story, but not in the same order of incidents in which he told it. Dislocate his train of ideas, and you put him out; you disturb his memory of his lesson. Thus, begin your cross-examination at the middle of his narrative, then jump to one end, then to some other part the most remote from the subject of the previous question. If he is telling the truth, this will not confuse him, because he speaks from impressions upon his mind; but if he is lying, he will be perplexed and will betray himself, for speaking from the memory only, which acts by association, you disturb that association and his invention breaks down.

§ 430. "When you are satisfied that the witness is drawing upon his invention there is no more certain process of detection than a *rapid fire* of questions. Give him no pause between them; no breathing-place, no time to rally. Few minds are sufficiently self-possessed to maintain a consistent story under such a catechising. If there be a pause or a hesitation in the answer, you thereby lay bare a falsehood. The witness is conscious that he dares not stop to think whether the answer he is about to give will be consistent with the answers already given, and he is betrayed into contradictions. In this process it is necessary to fix him to *time*, and *place*, and *names*. 'You heard him say so?' 'When?' 'Where?' 'Who were present?' 'Name them.' 'Name one of them.' Such a string of questions following one upon the other as fast as the answer is given, will frequently confound the most audacious.

Fit names and times and places are not readily invented, or if invented not readily remembered." ¹

§ 431. In the passage just quoted a wide range of examination is counselled. But we must say that the range should be still wider. Besides aiming to lead the witness into self-contradictions, he should be pressed hard in every quarter accessible where he can be drawn into contrariety to credible testimony, or be made to forget or deny probable or proven facts favorable to the other side, or his gross bias or partisanship for the party calling him, or his strong hostility to the other be shown. We may illustrate by the famous cross-examination of Majocchi in the trial of Queen Caroline. Being called to prove that the Queen had committed adultery with her menial Bergami, he had testified to a great many circumstances which, if true, established her guilt. He had narrated incidents and details extending through a long time and occurring in many places. In his cross-examination Brougham asked as to a vast number of contemporary surroundings to which the witness had not testified. Majocchi would often profess not to remember. One desiring to master the subject will do well to begin with that part of Brougham's speech which is devoted to this witness.² That will give him a good understanding of the crucial interrogation and of the self-destroying answers; and it will profit the student to see how a most able cross-examination was most ably set forth and commented upon and enforced in argument.

¹ Advocate, 405-408. This quotation is perhaps the best passage in the author's chapters on the examination of the witnesses. But we call attention to it for the further reason that it vividly presents what English writers seem to think are the qualities of the cross-examiner most demanded by the needs of practice.

² Trial of Queen Caroline, (New York, 1874,) Vol. II. pp. 35-46.

§ 432. The cross-examination, by Williams, of Louise Demont, in the same trial, is also a model. She was more self-possessed and ready than Majocchi, and her demolition was not so apparent. Her sifting was systematic and exhaustive. And the way in which she was led into contradiction of her letters and then into a grossly improbable explanation of them, and the cogent comment made upon it afterwards by Williams, merit special attention.¹

§ 433. We must remind our reader again, that such supereminent triumphs as the two just mentioned are but seldom achieved. They occur far less frequently than great speeches. All of us who attend the courts are now and then delighted with a burst of eloquence, but we may haunt them for years and never hear a cross-examination approach even faintly to either that of Majocchi or Demont. Still, the lawyer must be prepared for such opportunity. Now and then a tremendous tide of favoring feeling or great partisan influence is at work for the wrong side of the case, and fast and unscrupulous witnesses, propped up by the popularity and strength of the preferred party, come into the box with helping fictions. As the people who hear wish the adversary to succeed, they eagerly swallow the testimony. Here the cross-examiner must leave no stone unturned to make the untruth palpable. To do this he must be self-composed, patient, and exhaustive in his interrogation, aiming so clearly to demonstrate the improbability of the adverse testimony that, if he lose the verdict, a right-minded court will never refuse him a new trial. No better examples to train him for this great con-

¹ See Trial of Queen Caroline, Vol. I. pp. 338 *et seq.*, for the cross-examination, and Vol. II. pp. 117-120, for the comment of Williams on the testimony.

summation can be found in the whole range of judicial proceedings than these two cross-examinations: the one of Majocchi and the other of Demont. We regret that we have not the space to give them fully. The student should however con for himself what Demont called "two great masterpieces of forensic skill," familiarizing himself with the questions and answers in the full report now accessible to American readers.¹

§ 434. Majocchi and Demont represent witnesses whom cross-examination shows inferentially, as it were, to be false. But there are still others, who belong to a much less numerous class, where perjury is palpably detected. And as the lawyer should be ready to deal with such reckless swearers, we will give instances where some were brought to grief.

§ 435. The first is told by Judge Sharswood.

"He [a gentleman of the bar of Philadelphia] allowed nothing that occurred in a cause to disturb or surprise him. On an occasion, in one of the neighboring counties the circuit of which it was his custom to ride, he was trying a cause on a bond, when a witness for the defendant was introduced, who testified that the defendant had taken the amount of the bond, which was quite a large sum, from his residence to that of the obligee, a distance of several miles, and paid him in silver in his presence. The evidence was totally unexpected; his clients were orphan children; all their fortune was staked on this case. The witness had not yet committed himself as to how the money was carried. Without any discomposure, without lifting his eyes or pen from paper, he made on the margin of his notes of trial a calculation of what that amount in

¹ Trial of Queen Caroline, New York, 1874.

silver would weigh, and when it came his turn to cross-examine calmly proceeded to make the witness repeat his testimony step by step, — when, where, how, and how far the money was carried, — and then asked him if he knew how much that sum of money weighed, and upon naming the amount so confounded the witness, party, and counsel engaged for the defendant that the defence was at once abandoned and a verdict for the plaintiff rendered on the spot.”¹

§ 436. Here is a second instance.

The State, endeavoring to identify the prisoners indicted as the offenders, introduced a witness who testified that he met, a moment after the assault and battery charged had been committed, a party of men coming away from the place, with whom he held a brief parley in the dark. He further swore that these men were mounted and disguised ; that it was very dark, there being no moon ; that he could recognize none of them, but that he did recognize the riding horse of a particular one of the defendants. On cross-examination he was made to say that he was only in front of the horse and about five or six feet off, and to repeat his previous account of the extreme darkness of the night. He was then drawn on to make some absurd statements of his power on such a night to distinguish a brown horse from a bay and a dark brown from a medium brown, when in one of his replies he spoke of the defendant's *mare*. He was immediately asked if he knew that night it was a mare, and he said, “Yes.” He was next asked, as he stood at her head, how he could tell that the animal was a mare. The question dumfounded him. He looked down and burst into tears. His perjury had been ap-

¹ Legal Ethica, 11.

parent from the moment of his saying that he could distinguish a dark brown from a medium brown that night, but he was not checked and gravelled in his voluble lies until the last question left him no cover or loophole.

§ 437. Such blunders of witnesses as we have detailed in the last two instances will sometimes be overlooked. All the associate counsel should keep their attention fixed upon the answers. The quiet listener will often detect that which escapes the examiner.

§ 438. We will now add two instances from the practice of Daniel Webster.

The Kennistons were of respectable name. Goodridge accused them of having assaulted him with a pistol and robbed him. There were facts, such as the gold of Goodridge having been found in their cellar, which supported the charge. A friend of the defendants had told Webster that Goodridge's wound was on the inside ends of the fingers of the left hand, and had suggested that the prosecutor was feigning, in order to avoid the payment of his debts. This theory of the defence Webster kept to himself. He gives the following account of the trial.

"Taking all the circumstances together, the gold which was found and identified, the tracks and so on, the evidence was pretty strong against the accused. I had in my mind all the while what Perkins had said to me about shooting the inside of the hand; and after the government had examined Goodridge for three hours and made him tell a pretty straight story, they . . . gave him to me to cross-examine. Then for the first time in the history of the case, the line of defence developed itself in the first question which was asked. I never saw a man's color come

and go so quickly as when I asked him to explain how it was that he was wounded on the inside of the hand. He faltered, and showed the most unmistakable signs of guilt. . . . The Kennistons were triumphantly acquitted, and Goodridge fled. Everybody saw at once that he had perpetrated this robbery on himself.”¹

§ 439. Brown had taken from Bramble a bond to pay the former one hundred dollars a year for life. After a while Bramble began to persuade Brown to cancel the bond for a definite sum of money, but Brown would always refuse. It was Bramble’s custom to indorse the annual payments on the bond. At the next payment Bramble indorsed, not one hundred, but one thousand dollars as paid on the bond, adding “in full consideration of and cancelling this bond.” Brown, who could not read or write, signed the indorsement by making his mark, and the bond was kept by him. When Brown demanded payment at the end of the following year, the other contended that he owed nothing, and asserted that the last entry on the bond showed that the same was satisfied. Bramble was rich and influential, and Brown was a poor shoemaker, and the latter consulted Jeremiah Mason, but he had been employed by Bramble. So he went with the foregoing narrative of his case to Webster, who put faith in him and brought his suit. “The case came on at Exeter. . . . It created great excitement. Bramble’s friends were incensed at the charge of forgery; but Brown too, in his humble way, had his friends.”² The following is Webster’s narrative.

“I never in my life was more badly prepared for a case. There was no evidence for Brown, and what to do

¹ Harvey’s Reminiscences, 100, 101.

² Ibid., 69.

I did not know. But I had begun the suit and was going to run for luck, perfectly satisfied that I was right. There were Bramble and his friends with Mason; and poor Brown only had his counsel. And Mason began to sneer a little, saying, 'That is a foolish case.'

"Well, a person named Lovejoy was then living in Portsmouth; and where there is a great deal of litigation . . . there will always be one person of a kind not easily described,—a shrewd man mixed up in all sorts of affairs. Lovejoy was a man of this kind, and he was a witness in nearly all the cases ever tried in that section. He was imperturbable and never could be shaken in his testimony. Call Lovejoy, and he would swear that he was present on such an occasion; and he seemed to live by giving evidence in this way. I was getting a little anxious. . . . I was going to attempt to prove that Brown had been appealed to by Bramble for years to give up his bond and take a sum of money, and that he had always stoutly refused; that he had no use for money and had never been in the receipt of money; and that he could not write and was easily imposed upon. But although I felt that I was right, I began to fear that I should lose the case.

"A Portsmouth man who believed in Brown's story came to me just before the case was called, and whispered in my ear, 'I saw Lovejoy talking with Bramble just now in the entry, and he took a paper from him.' I thanked the man, told him it was a pretty important thing to know, and asked him to say nothing about it. In the course of the trial Mr. Mason called Lovejoy, and he . . . testified that, some eight or ten months before, he was in Brown's shop, and that Brown mended his shoes. . . .

He naturally fell into conversation about the bond, and he said to Brown, 'Bramble wants to get back the bond; why don't you sell it to him?' 'O,' said Brown, 'I have; he wanted me to do it, and as life is uncertain I thought I might as well take the thousand dollars.' He went on to testify that the 'said Brown' told him so and so; and when he expressed himself in that way I knew he was being prompted from a written paper. The expression was an unnatural one for a man to use in ordinary conversation. It occurred to me in an instant that Bramble had given Lovejoy a paper on which was set down what he wanted him to testify. There sat Mason full of assurance, and for a moment I hesitated. Now, I thought, I will make a spoon or spoil a horn. I took the pen from behind my ear, drew myself up, and marched outside of the box to the witness stand. 'Sir,' I exclaimed to Lovejoy, 'give me the paper from which you are testifying.' In an instant he pulled it out of his pocket; but before he had it quite out, he hesitated and attempted to put it back. I seized it in triumph. There was his testimony in Bramble's handwriting."

The end was that the case was settled on terms dictated by Webster.²

§ 440. In conclusion as to the witness whom you would show to be untruthful, we say that you will but seldom succeed save by having him to evince great partisanship, or to narrate manifest improbabilities. And as this particular sort of cross-examination is so much more frequently used with effect than any other belonging to our present division of the subject, it calls for a proportional attention from the student.

¹ Harvey's *Reminiscences*, 67-73.

§ 441. We have now made a distinct and tolerably complete outline of the process of cross-examination. We give here the following summary of its real objects : —

1. The rectification of the narrative, which is incomplete because the direct examiner has kept to chosen questions, that is, if you have good reason to anticipate that this rectification will prove advantageous.

To elicit circumstances that show the witness biased, or unable to have understood accurately, or to be mistaken, without taxing him with falsehood, in order to smooth the way for your own evidence or to overturn the foundations of his testimony, also belongs to this head.

2. To make him prove facts material to your case.

3. To prepare for impeachment, or to convict of great recklessness and partisanship or of actual perjury.

This is the core and essence of the subject. But we must now treat of some particulars for which we could not find an earlier place.

§ 442. We begin with considering the proper manner of the cross-examiner. Inexperienced counsel often seem to resent the appearance of witnesses for the adversary; and the demeanor of those of experience is usually too hostile, often driving an honest and impartial man to taking up a stubborn resistance. Quintilian says: "It has been advantageous on certain occasions not to press too severely on men of probity and modesty; for those who would have fought against a determined assailant are softened by gentle treatment."¹ Perhaps we should say that ordinarily the best behavior towards an adverse witness is a friendly one, not however strained into evident hypocrisy. Mr. Harris counsels wisely when he says:

¹ *Institutes*, V. 7. 27.

"It will be clear that to cross-examine with anything like success the most thoroughly good temper should be preserved. An ill-tempered advocate would be something like a jibbing horse, he would do everything but go along smoothly." ¹

We have noted the few instances when you may manifest indignation at unmistakable perjury. But you must even then be on your guard not to lose your self-command.

§ 443. We must say a few words as to interrogation. It is the privilege of the cross-examiner to ask leading questions, and often you cannot fully sift the witness without exercising it. You must remember, however, that sometimes a question which discloses your real purpose will be imprudent. We will add an instructive passage from Mr. Harris, which shows how you should do when dealing with a hostile witness : —

"One of the greatest cross-examiners of our day advised a pupil in cross-examining a hostile witness upon a point that was material to put ten unimportant questions to one that is important, and when he put the important one to put it as though it were the most unimportant of all. . . . 'And when,' said the learned gentleman, 'you have once got the answer you want, *leave it*. Divert the mind of the witness by some other question of no relevancy at all.' There is no occasion to emphasize an answer while the witness is in the box, if the question be properly put. The time for that will come when you sum up or reply. If the witness sees from your manner that he has said something which is detrimental to the party for whom he has given the evidence — unless he be an honest witness — he will endeavor to qualify it, and perhaps he will succeed

¹ Hints on Advocacy, 49.

in neutralizing its effect. If you leave it alone, it may be that your opponent may not perceive its full effect until it has passed into the region of comment. Nothing is more unskilful than repeating a question when you have obtained a favorable answer." ¹

§ 444. But it is often needful that you take pains to be intelligible. Thus Quintilian says: "Questions should be put, as far as possible, in familiar language, that the person under examination, who is very frequently illiterate, may clearly understand, or at least may not pretend that he does not understand; an artifice which throws no small damp on the spirit of the examiner." ²

§ 445. You should avoid proving new facts for the adversary, or bringing out those already proven in a more potent form. You will often see the case of the adversary, which was very weak when he ended his examination in chief, made invincible by the cross-examiner. We may term this a puerile blunder.

§ 446. You must shun that which is very damaging to your case. As Mr. Harris says, "It is a good rule in cross-examining a witness *never to ask a question the answer to which may be adverse to your case*. Nothing but absolute necessity should induce a departure from this. There are so many ways of framing a question or a series of questions that it would disclose a poverty of ingenuity indeed if you asked one that might involve the fate of your client." ³

In the tentative interrogation which you must often employ upon an unknown witness, you cannot expect all his answers to be effective for you. Those which are

¹ Hints on Advocacy, 57, 58.

² Institutes, V. 7. 31.

³ Hints on Advocacy, 56.

immaterial will not hurt, but those which are seriously unfavorable fall upon your case with double force because you cause them yourself.

§ 447. And you should not touch upon new matter which the re-examiner may make good use of, but which would have been closed to him but for you. We take an excellent illustration of this rule from Mr. Harris : —

“ You may get in a conversation that may be fatal to your case. Suppose the question to be the contents of a lost will. A legatee under it gives the following evidence : ‘ I remember the fact of the testator making his will. I saw him writing it and I read it at the time. I was left a thousand pounds by it and my two brothers were left severally the same amount. I last saw the will two months ago.’ Now it might be that the whole case depended upon the accuracy of the witness’s memory, or upon that coupled with his credibility. Plaintiff’s counsel is desirous of showing that on the day the will was made the witness went for a doctor, and told him *at that time* the contents of the will. If this statement could be given and it were identical with that made in the witness-box years after, it is clear that it would go a long way to establish the accuracy of the witness’s memory, as well as his credibility. But it is not admissible as evidence in chief. A question however in cross-examination would admit every word.

“ Nor does the danger cease when this witness leaves the box. The doctor, a witness to the will, may be called. He may not have read it, but an inadvertent question may enable him to say what the last witness told him on the occasion in question.” ¹

¹ Hints on Advocacy, 48.

We may suggest that you should learn from the current manuals of Evidence what are the topics which can be opened only in cross-examination, and after that your discretion must guide you in using or abandoning the special privileges.

§ 448. "There is another danger not to be lightly regarded, and that is of *persisting in pressing a question upon a reluctant witness*. When you find a witness unwilling to give the evidence you seek, and you have drawn him as near to the point as there is any hope of his being drawn or driven, it is always dangerous to attempt to urge him further. If you have nearly got an affirmative and you press him overmuch, you may irritate him into giving a direct negative."¹

"It may be remarked . . . that good generalship may be often shown in skilfully availing yourself of *the silence* of a witness. A refusal to answer or an evasion of your question will frequently be more serviceable to you than his words. On such occasions, when assured of the advantage with which you can employ in your argument to the jury that reluctance to reply, you will not continue to urge him after having plied him fairly; but having done enough to satisfy the court that he *can* say something more if he pleases you should withdraw, and then you may suggest such inferences from his silence as may be most advantageous to your cause. It is one of the most frequent and fatal faults of young advocates that they *will have* an answer *in words* to *every* question they put, forgetting that the answer may be injurious, while the silence may be more than suggestive of all that it is their design to elicit."²

¹ Hints on Advocacy, 48.

² Cox, Advocate, 387, 388.

§ 449. Quintilian thus notices another point: "All questioning ought to be extremely circumspect, because a witness often utters smart repartees in answer to the advocates, and is thus regarded with a highly favorable feeling by the audience in general."¹

The cross-examiner sometimes draws great discomfiture on himself. The following is told of Choate, and it may serve as an illustration to both this and the last section. It "occurred in the trial of a question of salvage. It was the case of *The Missouri*, an American vessel stranded on the coast of Sumatra, with specie on board. The master of the stranded vessel, one Dixey, and Pitman, the master of the vessel that came to her aid, agreed together to embezzle the greater part of the specie, and pretend that they had been robbed of it by the Malays. Mr. Choate was cross-examining Dixey very closely to get out of him the exact time and nature of the agreement. The witness said that Pitman proposed the scheme, and that he objected to it, among other reasons, as dangerous. To which he said Pitman made a suggestion intended to satisfy him. Mr. Choate insisted on knowing what that suggestion was. The witness was loath to give it. Mr. Choate was peremptory, and the scene became interesting. 'Well,' said Dixey at last, 'if you must know, he said that if any trouble came of it we could have Rufus Choate to defend us, and he would get us off if we were caught with the money in our boots.' It was several minutes before the court could go on with the business."²

§ 450. Mr. Cox gives advice which it would be well for the cross-examiner always to follow, if he could, in these exigencies. He says: "When such a *contretemps*

¹ Institutes, V. 7. 81.

² Brown's Life, 3d ed., 451.

occurs it is most important that *you* should not appear to be taken by surprise. Let neither countenance, nor tone of voice, nor expression of face, show to the spectators that you are conscious of being taken aback. If they laugh, be not vexed ; if others exhibit surprise, be as calm and appear as satisfied as if *you* had expected it. Thus you will repel the force of the blow, for seeing that you are not perplexed by it the audience begin to suppose it not to be so important as they deemed it to be, or they give you credit for some profounder purpose than is apparent, or that you are prepared with a contradiction or an explanation. Sometimes, indeed, where the blow has been more than usually staggering, it may not be bad policy to weaken its force by openly making light of it, repeating it, taking a note of it, or appending a joke to it. At no time is self-command more requisite to an advocate than at such a moment, and never is the contrast between experience and inexperience, the prudent and the injudicious, more palpably exhibited.”¹

§ 451. We close this long chapter by giving the pertinent Golden Rules of David Paul Brown. They are not quite as excellent as those of the same author for the examination in chief. Still they deserve attention, as being the production of a very able *nisi prius* lawyer of great experience and rare culture. The energy, freshness, and epigrammatic polish of all the Golden Rules, both those for direct and those for cross-examination, with their practical wisdom, are in most grateful contrast with the ordinary dulness of law-writing.

§ 452. “*First.* Except in indifferent matters never take your eye from that of the witness. This is a channel of

¹ Advocate, 888.

communication from mind to mind the loss of which nothing can compensate.

‘Truth, falsehood, hatred, anger, scorn, despair,
And all the passions — all the soul is there.’

“*Second.* Be not regardless, either, of the voice of the witness; next to the eye, this is perhaps the best interpreter of his mind. The very design to screen conscience from crime, the mental reservation of the witness, is often manifested in the tone or accent, or emphasis of the voice. For instance, it becoming important to know that the witness was at the corner of Sixth and Chestnut Streets at a certain time, the question is asked, ‘Were you at the corner of Sixth and Chestnut Streets at six o’clock?’ A frank witness would answer, perhaps, ‘I was near there.’ But a witness who is desirous to conceal the fact and defeat your object, (speaking to the letter rather than to the spirit of the inquiry,) answers, ‘No’; although he may have been within a stone’s throw of the place, or at the very place, within ten minutes of the time. The common answer of such a witness would be, ‘I was not at the corner at six o’clock.’ Emphasis upon both words plainly implies a mental evasion or equivocation, and gives rise with a skilful examiner to the question, ‘At what hour were you at the corner?’ or, ‘At what place were you at six o’clock?’ And in nine instances out of ten it will appear that the witness was at the place about the time, or at the time about the place. There is no scope for further illustrations; but be watchful, I say, of the voice, and the principle may be easily applied.

“*Third.* Be mild with the mild, shrewd with the crafty, confiding with the honest, merciful to the young,

the frail, or the fearful, rough to the ruffian, and a thunderbolt to the liar. But in all this never be unmindful of your own dignity. Bring to bear all the powers of your mind, not that you may shine, but that virtue may triumph and your cause may prosper.

“Fourth. In a criminal, especially in a capital case, so long as your cause stands well, ask but few questions, and be certain never to ask any the answer to which (if against you) may destroy your client, unless you know the witness perfectly well, and know that his answer will be favorable equally well ; or unless you be prepared with testimony to destroy him if he play traitor to the truth and your expectations.

“Fifth. An equivocal question is almost as much to be avoided and condemned as an equivocal answer. Singleness of purpose clearly expressed is the best trait in the examination of witnesses, whether they be honest or the reverse. Falsehood is not detected by cunning, but by the light of truth, or if by cunning it is the cunning of the witness and not of the counsel.

“Sixth. If the witness determine to be witty or refractory with you, you had better settle that account with him at first, or its items will increase with the examination. Let him have an opportunity of satisfying himself, either that he has mistaken your power or his own. But in any result be careful that you do not lose your temper. Anger is always either the precursor or evidence of assured defeat in any intellectual conflict.

“Seventh. Like a skilful chess-player, in every move fix your mind upon the combinations and relations of the game ; partial and temporary success may otherwise end in total and remediless defeat.

"Eighth. Never undervalue your adversary, but stand steadily upon your guard. A random blow may be just as fatal as though it were directed by the most consummate skill: the negligence of one often cures, and sometimes renders effective, the blunders of another.

"Ninth. Be respectful to the court and the jury, kind to your colleague, civil to your antagonist; but never sacrifice the slightest principle of duty to an overweening deference toward either."¹

¹ Forum, I. 77-80.

CHAPTER XI.

RE-EXAMINATION. — CONCLUSION OF THE CONDUCT OF EVIDENCE.

§ 453. WE now take up Re-examination. Mr. Cox opens his chapter on the subject with a passage of interest to the American lawyer : —

“The cross-examination being closed, the duty of re-examination devolves upon the counsel on the other side. It is usually undertaken by *the leader*, even although the examination in chief had been conducted by the junior, probably because it is supposed to require the skill and caution which only experience can teach. You will remember that cross-examination is, in like manner and for the same reason, conducted by the leader as a matter of course, unless, as is sometimes the case, where the witness is unimportant, or he has great confidence in his junior's ability and prudence, he *requests* you to undertake the task. *Then*, and only then, have you an opportunity of practising the lessons you may have learned.”¹

The general rule in American practice is that the counsel who examined in chief conducts the re-examination. Other things being equal, any branch of the examination should be given to the counsel who is best acquainted beforehand with the testimony of the witnesses.

¹ Advocate, 435.

§ 454. Mr. Cox says further : —

“The object of re-examination is simply to obtain from the witness *an explanation* of that which he has said in cross-examination. The necessity for giving to a witness such an opportunity proceeds from the system adopted in our courts of eliciting evidence by means of questions. A witness does not tell his story without interruption, as is the practice in most of the law courts on the Continent, but he is required to answer the questions of counsel and seldom permitted to do more or to accompany his answer with an explanation. A skilful advocate, in his cross-examination, avails himself of this to obtain such answers only as suit his purpose, excluding the explanations that might give them another meaning. It is the duty of the advocate on the other side to note such replies, and on re-examination to give to his witness the opportunity for explanation denied to him before.”¹

§ 455. We have shown that one of the purposes of cross-examination is to counteract the garbling questions of the examiner in chief. To counteract the garbling questions of the cross-examination is the chief purpose of the re-examination. The cross-examiner not only can probe the witness as to his means of knowledge, his feelings, bias, but he can also elicit independent proof of his case. And by reason of his right to restrain the witness from giving more than mere replies to his questions, only a portion of the truth may be stated by the answerer, and that in such a form as to impart falsehood. Thus one who has testified on the direct examination to an occurrence may be asked on the cross if it was not at night, and if he answers affirmatively he may stand some-

¹ Advocate, 436.

what discredited until the re-examination permits him to say that there was a good artificial light by which he saw clearly. An item of indebtedness of the plaintiff to the defendant pleaded as a set-off may be proven by making the plaintiff's witness on cross-examination testify to an admission; but the re-examination may draw out the further fact, that, when the admission was made, the plaintiff also said that the indebtedness had been paid, or that its consideration was illegal.

The privilege of re-examination is all the more necessary because of the privilege of the cross-examiner to so frame his questions that the witness can only answer yes or no.

§ 456. But the re-examination serves other purposes. The witness, from bewilderment or heedlessness or fright, may have made during his cross-examination such inaccurate statements that you must have him to correct them.

§ 457. The great prompter and fountain of a judicious re-examination is that which rightly informs the direct and the cross, — knowledge of the facts, and especially familiarity with the narrative of the witness. Of course you ought to have learned everything possible of the case. And where the witness is important, — if life, liberty, reputation, or fortune hang on his testimony, — how can you excuse yourself if you have not heard him over and over until you have so mastered his evidence that even the shrewdest cross-examiner can neither distort nor discredit it?

§ 458. Mr. Cox deals with the subject in the following passage: —

“ Before you have sat in the courts many days you will discover the vast difference between different advocates

in the ability with which they conduct a re-examination. Sometimes you will see a witness who has been apparently destroyed by a cross-examination triumphantly set up again by the admirable skill with which he is re-examined, — every weak point strengthened, every contradiction explained away, every doubt removed, and his original story repeated with confirmations. On the other hand, when undertaken by an inefficient advocate, you will observe how bad is often made worse by injudicious attempts to mend it, and that which had been left in doubt by his adversary converted into a defeat. The difference will be found to consist mainly in that *discretion* which enables the advocate to advance his questions to the precise point at which the answer will be innocuous, and, avoiding such as are not touched upon in the cross-examination, so moulding his queries that they shall, while adhering strictly to the rules, necessarily bring out those leading points in his own case which he is desirous of repeating.”¹

§ 459. Mr. Harris likewise exaggerates the usual effects of cross-examination. He says: —

“If you have watched the cross-examination with that unceasing vigilance which you ought to have bestowed upon it, you will have observed and noted the points that have been made against you. Some of your evidence has disappeared altogether; other portions have received such a shock that they exist in a very rickety and dilapidated form; some other parts have received a coating of interpretation, if I may use the expression, which must be removed; other fragments lie here and there in a mass of confusion, from which they must be extricated if you desire to re-establish your case. A hurricane seems to have

¹ Advocate, 438, 439.

swept over your homestead, destroying some of your less substantial outbuildings and threatening even the mansion-house itself.”¹

And in another place he says : —

“ As you watch carefully the cross-examination of your witness, you will probably be made aware for the first time of many weak points in your case. If there should be one which you have flattered yourself has been passed cleverly by in your examination in chief, you may certainly anticipate a well-directed blow in *that* quarter at all events. You must watch, therefore, like a second in a pugilistic encounter, for when it comes your witness will in all probability require picking up. How to do it is more than I can tell, as I am not holding your brief and know nothing of the facts. It is in the remedying of such a misadventure that the art of re-examination consists ; and it is only by an intimate *knowledge of your facts* and *their relative bearings* that you will be enabled to set your witness up when his evidence has been thus battered.”²

§ 460. We have reviewed the various trials to which cross-examination subjects a witness. It makes him misreport new matter, or it cuts him off with only so much of explanation as is worse than none at all ; it induces suspicion that he is mistaken ; it develops improbability ; it menaces impeachment ; and occasionally it entangles in fatal self-contradiction or convicts of manifest perjury. If your witness is in the last category and you see that there is no help for him you will resolutely abandon him. But you can generally do something of importance. Where the cross-examination has only misrepresented the witness, — as is very often the case, from the use of artfully as-

¹ Hints on Advocacy, 153, 154.

² Ibid., 155, 156.

sorted questions, — you are to remove the check by which the adversary suppressed certain details in order to attack your case or to reflect on the witness. If you have the “intimate knowledge of your facts and their relative bearings,” as demanded by Mr. Harris in the last quotation, your task is easy. The witness will almost right himself alone in the more important parts, if you but let him know that he is now at liberty to do so. When you have corrected every material misstatement and explained all that your adversary has made to need explanation, your work of repair and restoration is done. Of course you will not lead him into untrue or improbable explanations.

§ 461. We add a little good counsel of Mr. Cox : —

“When you come to some doubtful matter on which the cross-examination has damaged you, extract from the witness an explanation of it, if he can make it ; if he cannot satisfactorily explain it, pass it by, for a failure to effect this object serves only to give it a double importance in the estimation of the court. Here it is that all your sagacity is called into play. It happens frequently that your brief gives you no information on the new point started, and the attorney who sits behind you cannot help you : it is as new to him as to yourself. Failing help from these sources you will seek to form a judgment from the manner of the witness whether the fact is as it appears, or if he can give any explanations of it. If, when questioned upon it, he showed signs of annoyance and an eager desire to say *something more* about it, you may conclude that he can explain and you can safely call upon him to do so. If this symptom is absent, then your sagacity will be exercised in a review of the internal probability or otherwise of the matter itself. If any improbability appears, you may try

with extremest caution to approach the topic, so as to afford to your witness an opportunity of clearing himself, if he can, but so tenderly that you may retreat unharmed should you find that you are treading on dangerous ground. Wanting all these encouragements, you will prove your *discretion* by passing it unnoticed. Here again we reiterate the caution, so often repeated to you already, never to put a question to a witness without an aim, nor unless you expect to derive some positive advantage from it. It is wiser to leave a bad matter untouched than to notice it, unless you are *sure* that you can make it better. If you cannot do good, you are almost certain to do harm. More of the advocate's art is shown in *silence* than in *speaking*.”¹

§ 462. We have noted in the last chapter that the cross-examiner can often introduce subjects which his adversary cannot, and that after they have been so opened by him you can further develop them in re-examination. It is patent that you will re-examine or not as to this new matter according as you expect or do not expect advantage therefrom.

§ 463. Mr. Cox notes another important point in the following language : —

“A skilful use of the opportunities sure to be offered by the cross-examination will enable you to elicit a *repetition* of the most important parts of the evidence in chief, and so, by recalling them to the attention of the jury, not only to revive the impression made by them, but to operate as a set-off against whatever of an unfavorable character may have been extracted by the cross-examination.”¹

§ 464. The conclusion of Mr. Harris's sixth chapter is

¹ Advocate, 440, 441.

² Ibid., 438.

such an excellent summary, that we adopt it here as our own conclusion. He says : —

“ Re-examination arises from a right to explain. It is often so advantageous that a case may be won by its judicious exercise, while it is usually so innocent of evil that it would require the utmost ingenuity of the most inexperienced counsel to make it the means of losing one. You must have a thorough knowledge of your facts and have watched every question of the cross-examination with the utmost vigilance, to take the full benefit of your right and to make your case stand out in the bolder relief which the re-examination will afford to it. But nothing is more tedious or more irritating to judge or jury than to see an advocate floundering in re-examination among facts which he only displaces and confuses, thinking he must needs ask something because there has been a long and it may be severe cross-examination. First *ascertain what fact has been displaced or obscured* and *what new matter introduced*, and then you will know what requires to be rearranged and what to be explained before you rise to put a single question.

“ In re-examination, as in cross-examination, after learning thoroughly *how to do it*, the next branch of learning to which the student had best direct his assiduous attention is, *How NOT TO DO IT.*”

§ 465. Here we close the systematic presentation of our present theme in its three leading branches, — examination in chief, cross-examination, and re-examination, — treating, however, in the following sections of this chapter a few details which belong rather to the general subject than to any of its particular parts. We have derived much assistance and instruction from the authors who have preceded

us. All of them, from Quintilian to Mr. Harris, seem to us open to a serious criticism. It is that they everywhere by example, and nearly everywhere by precept, inculcate that he is the best examiner who most successfully hides unfavorable truth. Our times call for a higher morality. While it is not incumbent on counsel to make out the case of the adverse party, still he is not to be tolerated in so conducting an investigation as to cause a false presentation or suppression of facts and thereby defeat justice. Let the lawyer be trained to win by truth ; let him be taught to fight for and with nothing else ; and he will then resort to trick and chicane as little as a man will try to travel by flying. Thus will the real purpose of the bar be realized. Our country has no need for a band of lawyers perpetually vigilant to cheat the honest and win false verdicts. A lawyer may rightly demand for his client every advantage which the law gives him, even if the particular law be bad. He is not answerable for the law which he does not make. But he stains his conscience if he permits falsehood and encourages the concealment of truth. And duty and prosperity go hand in hand. The lawyer whose great business it is to look for the truth of the facts of his cases, and who is not afraid of this truth, will always have his adversaries afraid of him. He will only fail in cases where he will confess that he ought not to succeed.

§ 466. We open the topics alluded to in the beginning of the last section with some good advice of Mr. Cox : —

“ Let us warn you against a fault into which young advocates are especially apt to fall, — that of making too frequent and too frivolous objections. Many inexperienced men appear to think that by continually carping at the questions put to the witnesses by the other side they are

proving how quick and clever they are. But this is a mistake.”¹

The lawyer should train himself to meditate while listening to the examination of his adversary, how he will reply to it by examination. To be on the alert for objections to questions interferes with and often prevents this attention. You will note that the most successful trial practitioners rarely object to a question. Their minds are occupied with the testimony, the witness, and what they purpose to do with both when their turn comes.²

Still it is often important to cut off illegal interrogation ; and when you must make objection, it should be done quietly, and usually without much argument, unless the court is in doubt.

It is to be observed that some lawyers are very expert in providing grounds for a new trial by judicious objection to testimony not very strenuously urged.

§ 467. The manner of the counsel conducting an examination is of great importance. We too often see those of experience lose patience with a dull witness of their own, and speak to him too sharply. All of us should recollect that in the court-room we are at home, and that parties and witnesses are in some sort our guests, and guests frequently ill at ease. It behooves us not to be rude and unmannerly in our own house ; and the glaring impolicy of anything but the most pleasant treatment of witnesses should never be forgotten. The jury represent the non-professional public. They naturally sympathize with all who come from their own class, and they have the keenest sense of insults from lawyers. Blustering is usually of no avail. Convince

¹ Advocate, 367.

² Compare 7th and 8th Golden Rules, *ante*, § 452.

an honest jury, not by browbeating and confusion, but by an unexcited, gentlemanly show of the truth that a witness is mistaken or over-biased, or is lying, and they will find against him with evident pleasure. But sometimes, when looking on, I have fancied that I have seen good cases lost because the jury were driven away from them by a too rough handling of the adverse witnesses. If this were so, it was not so much the fault of the jury as of the bullying and hectoring counsel who blinded them to the merits of his side.

§ 468. If the trial is long and there are many details of evidence, often much that has not been anticipated will be proven. This new proof, whether it comes from adverse witnesses or the cross-examination of your own, will often point to other witnesses or other documentary evidence, and they should be investigated by you, if possible, in time to make use of them. This duty must be done by yourself during a recess, or be deputed at once to an associate, who should take care to be swift enough without being too swift. The instance quoted above from David Paul Brown of the examination of the shot during an interval of a trial is a good illustration.¹

Get in every available parcel of proof. The courts often allow a reopening, even during the argument, in order to hear evidence which had been inadvertently overlooked or which has just been found. And the discovery during the trial of important testimony which cannot be had immediately, where there has been no lack of diligence, is frequently allowed to be a ground of postponement.

§ 469. We will give an illustration of the advantage of reopening the evidence. The master of a schooner was

¹ *Ante*, § 404.

on trial, charged with casting away his vessel with intent to defraud the underwriters. There had been a mistrial. The government had procured new evidence, and was now confident of a conviction. During a recess before the argument, just after the testimony had been closed, Choate, who was counsel for the defendant, accidentally overheard the colored cook — who was attending as a witness for the government but who had not been examined — make a statement which he deemed favorable. The former asked permission of the court to put in an important proof which had just come to his knowledge. The cook was called, and Choate asked him what was the behavior of the master on leaving the vessel, to which the witness answered, "He cried like a child." This was all. And the jury could not reconcile this crying over the loss of his dear vessel with design on his part to destroy it, and there was an acquittal.¹

§ 470. In all occasions of surprise by testimony, you should go slowly and with care. Some counsel are very dexterous in manœuvres by which they make time to con over an important document, to prepare a right cross-examination for a witness unheard of before he came on the stand, or counter proof against unexpected evidence. But if you cannot secure the leisure that you would prefer, you must keep all your wits about you in order that your vision and invention be strained to the utmost. The one may discover the new adversary to be a mere man of straw, and the other may give you sufficing arms out of your present store or show you such near to hand.

§ 471. There are certain topics from which the adversary can be kept if you do not go into them yourself.

¹ Neilson, *Memories of Rufus Choate*, 403, 404.

Thus you should avoid questioning as to the character of your client unless you can uphold it; for the other side cannot attack it until you bring it in issue. This instances how a blunder in the direct may give occasion to the cross-examination. We have noted in this chapter how the latter can give new range to the re-examination. But the point we wish to deal with now is the policy of restraining or giving the reins to your evidence. You can stop too soon, as we illustrated above by the counsel for the prosecution who proved only the killing in order to coerce the prisoner to rebut the presumption of murder by evidence and thus lose the conclusion of the argument.¹ And I have seen the plaintiff reserve for his rebuttal evidence which he expected to prove a masked battery, and be unable to get it in, either from the defendant's calling no witnesses, or from his well-taken objection that the proof offered too late is not rebutting. On the other hand, a party can go too far, of which we will give an example.

§ 472. The trustees of an association had brought a bill alleging that a deed which purported to be their own was a forgery, and also that it was without authority. If the occupier sustained the deed against the first attack, it would serve as color of title and be the foundation of a good prescription, as he had bought in good faith and without notice of any defect, and he would prevail. The plaintiffs proved by themselves that they did not execute the deed, and rested without attempting to show more. The defendant called the subscribing witnesses, men of much better character and greater credibility than those who had just testified, and they satisfactorily supported the due execution of the deed. Here he ought to have

¹ See *ante*, § 276.

stopped. But he introduced several members who testified that a meeting of the association had authorized the deed to be made. The plaintiffs rebutted with a great array of members testifying the other way, and that the grantee was so plainly aware of this want of authority that his acceptance of the deed was such a fraud as under the peculiar law of Georgia prevented the acquisition of a prescriptive title. And so the defendant threw away the only opportunity of success he had.

§ 473. You should make all the counter proof possible which is called for by your adversary's case. I have seen a counsel lose a verdict because his client was not recalled to explain an admission, as he could have done honestly and satisfactorily. Whether you are for the plaintiff or defendant, always carefully note the details of the adverse evidence which you can and ought to contradict. I insist upon this, because I have observed the duty often unperformed by even experienced and able lawyers.

§ 474. Of course you will not rely too slavishly on your preparation. We often see a lawyer conducting a case upon a preconceived theory, which being too narrow he is all the while trying to trim down the facts to fit it. As the whole case — your own as pared off by your adversary and that which he has made — unfolds itself, any mistaken anticipation must be corrected, and your plan must find a place for everything.

§ 475. Next in value to the acumen of the lawyer — which will be fully discussed after a while — are the qualities of patience and self-possession. The case must be thoroughly understood and it must be wholly presented. To do these important things requires the existence of the two qualities mentioned in a high degree. Nothing is

more unlaywer-like than eagerness to close the evidence not fully finished and enter upon the argument.

§ 476. Self-possession is specially called for in the trial of a stubbornly contested case. There is generally a throng who attend, representing that great power in America, public opinion; and this audience, though ever so quiet, approve or disapprove. You feel it although you do not look at them. And then the passion and zeal of your client and all his side, the thrusts of your adversary, and many eager contests over points submitted to the court! In short, nothing but the extreme of coolness will save you from blundering and keep you ready to seize upon every advantage offered. Then forget everybody save the witnesses, the court, and the jury, and everything but the evidence.

§ 477. The length of our chapters on the conduct of the evidence needs no apology. Well did David Paul Brown say, prefacing his *Golden Rules*: "There is often more eloquence, more mind, more knowledge of human nature, displayed in the examination of witnesses than in the discussion of the cause to which their testimony relates. Evidence without argument is worth much more than argument without evidence."

§ 478. The putting in of the evidence has two chief objects: (1.) To prove the material allegations of your pleadings and strengthen them against attack; (2.) To make the court and jury perceive clearly their relevancy, force, and satisfactoriness. The mind that rightly arrays the proofs and intuitively sees — to use the parlance of the bar — when the case is made out, belongs to the lawyer, and the talent of so ordering these proofs and giving them such expression as that they will command attention and

understanding is also one of his possessions. And here we leave the subject, whether direct, cross, or re-examination, in this presentation of its leading object and highest merit, saying in conclusion that the examination, whichever of the three kinds it is, is the best which produces the greatest weight of supporting and defending proof, and presents this proof most impressively and intelligibly,—and that the evidence so conducted is generally almost the consummation of your labors.

CHAPTER XII.

NOTE-TAKING.

§ 479. DURING the trial you should keep a running memorandum of everything important. We have confessed above to the superiority of the English practice to ours in the matter of briefs, and we must also admit that the careful note-taking by both their judges and counsel is well worthy of a more extensive imitation here. We will commence with two passages from Mr. Cox, whom we have so often cited :—

“While the examination in chief is proceeding, it will be the duty of the counsel on the other side to give the most attentive ear to every question and every answer, and to take a note of it upon his brief.”¹

“Your notes of the evidence as it proceeds [that is, during the examination in chief of the adversary] should be fully taken, because you cannot anticipate at this period of the case what portions of it may prove to be material, nor where a question may arise as to what was the witness’s answer. In taking these notes you begin with the day and date on which the trial took place and the name of the judge. You then very briefly note the more important points of the opening speech, especially such as you purpose to answer, and you indicate such as will require

¹ Advocate, 366.

peculiar attention by scoring it twice or thrice. Then, stating the name of the witness and the counsel by whom he is examined, you set down his evidence, leaving a broad margin for your own observations, if any should occur to you. It is not necessary to give both question and answer, save where the question strikes you as one of special import, or to which you might desire to refer thereafter ; it will suffice merely to give the answer in the witness's own words, as nearly as you can observe them, so as to make them intelligible. Thus, if the witness be asked, ' Were you at Exeter on Saturday ? ' and answers, ' I was, ' — a leading question, but probably not worth objecting to, — you set it down thus : ' Was at Exeter on Saturday. ' But let it be a rule with you, so far as it is practicable, always to take the *very words* of the witness. As you proceed, you will find that the evidence suggests to you matter to be explained on cross-examination, or to be answered in your speech for the defence, or to be contradicted by your own witness. Here it is that you will find the margin useful. When such an idea occurs to you, never suffer it to escape, trusting to recall it when it is wanted ; for amid the multiplicity of claims upon your attention you cannot be assured that it will return ; but grasp it instantly, and in the margin, against the evidence that is so to be treated, set some mark which may catch your eye ; and if the words are not likely to suggest the thought you desire to recall, you can in a hurried sentence insert there that of which you wish to be reminded. This plan is especially useful for the purpose of cross-examination ; for it is extremely difficult to carry in the mind all of the evidence in chief that needs to be explained or deprived of its credit ; but with this scored and noted report of the witness's testi-

mony before you, it is unlikely that anything of moment will escape your attention.”¹

§ 480. The evidence is the main thing to be attended to. Mr. Cox directs that the very words of the witness be taken down. That is generally impossible to any one but a phonographer. We are advising you to make notes, not a full statement. What a dreary task it is to wade through a verbatim copy of questions and answers, where the reporter, paid according to the number of words, sets down all the “Wells,” “Says he’s,” and repetitions of the examiner and the witness. Before this mass can be understood it must be severely purged of the trivial, unmeaning, and irrelevant, often constituting more than three fourths of the whole. An expert long-hand note-taker, with the exact issues and the needs and purposes of both sides fully understood, can keep up with the most rapid witness, for he only writes the substance of that which is necessary to be remembered. There was an official reporter of my old circuit who was neither a short-hand nor a phonographic writer. He used many abbreviations, but no arbitrary characters, and his writing was easily legible to one who had heard the testimony. He never seemed to be behind. Of course he did not give the questions except when they were important, as, for instance, such as were asked to prepare for a contradiction. His report was not word for word, but it was always complete and true. Compared with a phonographic, it was as a well-made statement of facts by the reporter of decisions beside the disordered and unabridged record of which it is a condensation.

§ 481. Of course you cannot report the answers to your own questions. This work is for some one else, — your

¹ Advocate, 371-373.

associate or clerk. Or you may fill up omissions at the first stop, calling into service the official reporter, your colleagues, your adversary, — in short, anybody who can assist you.

Generally the notes should be taken by a counsel who does not examine. I have often fancied that it would be well to devolve on the leading counsel the duty of note-taking, who could easily prompt whatever examination he wished to be made by his junior. The examination of a witness is no great mystery. It consists in asking proper questions, which will often suggest themselves better to a listener than to the interrogator.

§ 482. But it is not only the evidence of which notes are to be made. Points urged by yourself and your adversary, especially the authorities of the latter, sometimes his very words, and always the intimations, rulings, and action of the court, are to be stated briefly and intelligibly. To do this enlightens you as to the rest of your evidence, your argument, and what you are to do in subsequent proceedings in the case, whether motion for a new trial, argument in the court of errors, or another trial.

§ 483. Some lawyers — as Scarlett did, for instance — eschew all memoranda, and surprise the observer by their wonderfully accurate preservation in memory of everything which happened and was said during the trial. But even this high achievement of the unaided memory is far inferior in efficiency to the leisurely contemplation of a full report of the proceedings on paper. The counsel going over his entries at every interval will often detect inconsistencies and other weak points of his adversary's case which would have escaped him altogether if he had kept no notes. He detects them because they are before his mind's eye a

sufficient time. Two horses, if met singly, may seem to the most observant to be of exactly the same color; and yet when they are actually compared they will appear quite different. We sometimes mistake one person for another, but we cannot do so after we have seen the two together. The superiority of note-taking over the best memory unaided is that it permits the testimony and important occurrences of the trial to be examined again and again. Even the ablest and most gifted of our profession have not the quickness of apprehension and fixity of impression which qualify them to dispense with records.

§ 484. I will give an illustration. I once knew a lawyer of good parts and fair standing, who, long after having heard a voluminous document read in court, and without refreshing his recollection, could give you the substance of the minutest particular *as he had understood it*. He was often opposed by another of greater power, but his inferior in the respect just mentioned. The latter would scrutinize and read and re-read a document, and when he came to notice it in his argument was as superior to the first in comprehension and acumen as his adversary was to him in quickness of apprehension and retentiveness. The greater lawyer—one who was the monarch of the bar of his State for forty years—owed his wonderful success to his precise and faithful knowledge of details, which knowledge he got from something that often seemed to be nothing but poring over them.

§ 485. The following passages describe the custom of Choate, who has left a reputation as a lawyer more enviable if possible than that of the great William Pinkney.

“He took constant and copious notes in an indescribable and incomprehensible hand. He would write

on up to the very last moment before rising to address the jury."

"When he came to address the jury two thirds of his argument apparently would be written."

"Every night during a trial he took home his notes; collated, digested, and rearranged them with reference to the final argument."

"He was critically careful to have every word down on paper which was uttered in evidence; and if he was called out of court at any time for a few moments, he would compliment some young member of the bar, or student who happened to be near him, by placing him in his seat to continue the notes of the evidence while he was gone."¹

§ 486. Of course none of us feels constrained to follow Choate exactly in his custom just described. But his desire to make up for his own use a complete report of the trial and a draft of much of his speech should be attentively meditated by those who disregard such helps. In his careful and extensive note-taking he is probably a forerunner of the coming lawyers, who will sift all things too thoroughly to blunder often. The investigation of facts becomes more earnest and laborious every year, and this is why our trials are longer than those of the past. The lawyer who masters every detail of his cases is called for on all sides, and no other can have creditable standing as a practitioner. He cannot dispense with note-taking. It is notorious that the attention of the mere listener is ever napping. But the note-taking must never flag, and so it will preserve for future advantage much that would have otherwise been lost.

§ 487. The practice of Choate in reviewing and re-

¹ Parker's Reminiscences of Rufus Choate, 140.

arranging his notes every night deserves to be held up as an example. All the effective parts of the testimony and everything else which we have advised you to note should be gone over carefully at every opportunity, — in the recess of the court by day or night, while a witness or counsel is waited for, or while your associate or adversary is making a point or arguing the case, — and prepared for the further conduct of your evidence, your speech, or for your use in whatever course may be taken after the verdict or judgment. The prominences in the testimony, the contradictions and conflicts, the attacks on some material witness, the preponderances of your adversary and those of your own, cardinal propositions of law and fact and relevant authorities, — all these things should be rightly digested at every interval, and put in convenient memoranda for instant use. This is something like the systematizing of the day-book and journal which is wrought by posting the ledger.

§ 488. The proceedings are usually taken down by the official reporter, and you can be furnished with a report. But it will always be necessary for you to have notes of your own that you may overlook and employ at pleasure.

The young men now coming into the profession should if possible acquire phonography. Who of us has not often desired to have the faculty of taking down as rapidly as words can be spoken the opening of the adversary, the documents read in evidence and the oral testimony, passages from the arguments, and the instructions of the court? But if you are not a phonographer, and will only be in earnest, you can do wonders in long-hand. Do not be flurried. Snatch every opportunity offered by

objections, useless questions and answers, and the many brief stops, and you will in general be well up. And let it be your desire above all things else to have your notes so accurate that not the most jealous adversary or over-careful friend can detect in them an addition or omission.

§ 489. We here close the chapter, hoping that, if we have not said all that can be said, we have been at least so suggestive that it will occur to the reflective reader.

CHAPTER XIII.

ARGUMENT.

§ 490. It is appropriate to begin this chapter with the argument mainly concerned with questions of fact, and which is to be made immediately upon the close of the evidence. Before the conclusion we shall find it profitable to set forth briefly the essentials of what we may call pure law arguments. His cases, some of them hinging on the evidence, others on law, and many of them on both, are perpetually requiring of the practitioner that he be able to make both kinds. The two must be merely distinguished and not divided. In the former there is frequent need to justify to the court some legal position the assumption of which is necessary in order to argue the facts properly, and in the other there must nearly always be considerable discussion of the evidence to show that the particular rules of law invoked are applicable. As a legal right in controversy is to be established or disallowed according to the existence or non-existence of certain facts, and therefrom it appears that facts are the elements of cases, it follows that the argument intended to ascertain and interpret the material facts is, as compared with the other kind, of superior importance. That all cases are only facts, is a truism. But, truism as it is, it must be consciously and completely grasped in its entire reach

before the essence of the lawyer's mission — whether he is advising, preparing, or arguing as advocate, or investigating and deciding as judge — can be clearly discerned. The real difference of one case from another is in its facts. The different law questions in each are asked, as it were, by the different facts, the latter being independent and leading elements, while the relevant law questions are but their shadows; and we may justly apply the maxim, "*Accessorium non ducit, sed sequitur suum principale.*"

§ 491. The contents of the last section being premised, we now take up the argument to the jury. Sometimes your whole business is with their sympathies, as where your only possible achievement is to obtain a recommendation to mercy of a prisoner who confesses the crime charged, or a relief of the guilty party in a libel for divorce from disability to marry again. But usually your employment is an appeal to their judgments, to the end that you convince them your case is better than that of the adversary. The evidence — to use Scarlett's phrase — is to be dissected.¹ The contending proofs are to be assorted and then weighed against one another. The proper methods of dealing with the facts in argument are now to engage us.

§ 492. The openings, the course of the evidence, and points made to the court on both sides, have given prominence to the questions really mooted, and every intelligent juror has begun to shape them to himself and entertain a dawning opinion upon them. It will not be exactly right to say that the issues in the record which were set out in the plaintiff's opening are your theme. Your side of some of them may stand so feebly that you must needs give it up while your adversary surrenders his side of others.

¹ See American Law Studies, §§ 1087, 1080.

There is clashing conflict in the witnesses and documents, the advantage being in parts for you and elsewhere for the adversary. It would be folly to demand uncompromisingly all that is claimed in your pleadings. To know what can be held, what can be wrested from the opponent, and what is really doubtful and may prove the reward of the better conduct, is the highest gift of the trial practitioner. The very last duty to be done before your speech commences is to complete the selection of the items for which you will contend and the grounds upon which you will take your stand. You have mentally and almost unconsciously made much of this selection while listening to the evidence, but for it to be finished rightly there should be first a careful comparison of all the conflicting proofs. If the trial has been long, you have tabulated the results of each day's evidence every night; and your memoranda are to hand. If the case is one of small compass in the facts and little variety in the questions, a short recess of the court or the opening speech on the other side may be time enough for this final preparation.

§ 493. In controversies of multifarious detail which require considerable investigation, it is your true policy to draft the skeleton of the main part of your contemplated argument. At every pause or stop in the trial you have reviewed the testimony from your memory, or your notes, or the report of the phonographer, and thus you have been informed what are the points which require your effort. For the plaintiff you are first to show that his *prima facie* case is satisfactorily proved, either the whole, or as much as you can hold in spite of all attacks, and next that the defendant's case, or some material part of it, falls because of intrinsic defect, or is overcome by stronger testimony;

if you are for the defendant, your objects will be the opposite of those just enumerated. You have two sorts of reflections to make, those which sustain your theory and those which oppugn the theory of the adversary. Your skeleton should enumerate that upon which you will touch, briefly indicating under each division what you have decided to say. If there is a central position on which the most of the case turns, that should usually be the beginning. And where you must take different and independent positions, it is better to put the more important in the front. We may have other occasions in this chapter to remind you that the freshness of the first attention of jurors to the argument of each side should always be utilized to the utmost.

§ 494. Before you make the last sketch of the plan or skeleton of your speech, you are to settle definitely what is the best verdict you can expect under the evidence. To claim too much will hurtfully lessen your influence; and it is plain that you ally yourself with the adversary if you make any surrender of your client's rights not demanded by overruling necessity. The proper mean between the two extremes is dictated by a wise judgment which has been sharpened and ripened by experience. As you grow in practice you will more and more develop the instinct which in a manner almost inexplicable leads you to avoid excess of demand or concession. The verdict which you can ask for as dictated by the weight of the evidence is your purpose, and to understand clearly what it is supplies the key to your arrangement. For it is a conclusion from the proofs properly sifted and marshalled.

§ 495. Perhaps the next point in natural order is to note that your course is through both affirmative and

negative propositions. You are to make good your positions and you are to dispute those of the opponent. Your argument will be an alternation of defence and attack, establishing the credibility of the evidence sustaining your case and destructively criticising that which is on the other side. The circumstances will suggest where to begin. If you are for the plaintiff, and the testimony proving the allegations of his declaration is strongly contested, it is generally better for you to establish first the credit of that testimony as far as you can. But supposing you are for the same party when the testimony just mentioned is not challenged, and the adversary has proved a plea in avoidance, your usual commencement will be an attack upon the support of this plea. These two instances fall far short of exemplifying the wide variety of practice, yet they sufficiently indicate the true start in all cases for him who is the actual plaintiff. It is to maintain as many particulars as possible of your claim when a counter position in the nature of the general issue is relied on, or to pull down the props upholding the affirmative proposition of the adversary confessing and avoiding. Of course the proceeding of the actual defendant will be the opposite. In the case first put he will commence with a negative, and in the second with an affirmative.

§ 496. Whether the first step is with an affirmative or negative, the next is generally with an opposite. The plaintiff who alleges the satisfactoriness of his proofs then denies that of the others, and the defendant, after arguing in favor of his plea in avoidance, passes on to contradict the counter evidence. And this process may go much farther than we have described, and it may under different heads taper off into the discussion of various small questions where you affirm or deny by turns.

This suffices to disclose the general nature of your arrangement. It is a list of propositions, — some of them affirmative as to the evidence which you press into service, and others negative as to that which you reject. They spring naturally from the testimony. If they are well taken, — that is, if they lead logically to the verdict claimed, — and if you maintain them, — that is, if you show from a fair collation of the evidence that they have a preponderance as against those of the other side, — you will generally win.

§ 497. So much for what we may term the selection of your propositions: only that we warn our student courageously to eschew all those which are not at least plausibly favored by the evidence. As a general rule they ought to be almost self-evident as soon as the relevant facts are arrayed. They should be such as commend themselves to the modes of reasoning and the sentiment of the common business man who is the typical juror. Some advocates refine too much, or are too abstruse, or are too severely logical, while on the other hand a far greater number fail to gather the testimony accurately and in truthfully collating and weighing it, and therefore their propositions are unmaintainable. So bear it in mind that you must be as discreet in deciding what propositions you will urge, as we have advised you to be in determining what verdict you will ask.

§ 498. Your propositions and their order being settled, then comes the proper disposition of the facts under them. Of course you are not to forget that this work was really done before in order to select your propositions. But now you must set down in the skeleton of your argument under each one, whether affirmative or negative, all that by which

it is maintained. And especially should you not shut your eyes to any adverse fact which is strong enough to engender a dangerous doubt against you. And you ought to attend to views that may prove hurtful, even if not suggested by your adversary. Your collation will be partial and injurious if you ignore the facts and theory on which your opponent builds. Even if the latter passes over this omission, or has no opportunity to reply to it, it may be rectified by the summing up of the court, or commented on unfavorably in the jury-room.

§ 499. You only do your full duty by exhausting all the material evidence. Often some particular proposition of yours will find its securest prop in the adverse testimony. You are to bring together under the proper division or subdivision of the skeleton whatever upholds your side, and whatever too that attacks it; and you are also to enter how you escape the latter.

§ 500. Your legal positions, with whatever authorities you intend to read, must likewise be jotted down in the skeleton where they belong. As a general rule no argument goes far before it makes appeal to some principle of law. We say as to the selection of your legal propositions, what we have said as to that of your propositions of fact; that is, always have them — if you possibly can — of such soundness and such clear applicability to the case that the judge will be disinclined to hear you argue them. The really effective forensic advocate hardly ever strays from the beaten track of the obviously true, either in law or fact.

§ 501. Your heads, notes of the proofs, law points, and references, should be stated very concisely. The briefer they are — provided they are easily intelligible — the less

interruption and trouble you will have in consulting them while you are speaking. They should be merely mnemonic, and not an abridged draft of your contemplated speech.

§ 502. We have thus shown the proper contents of the plan or skeleton of the speech. Such a skeleton is always made beforehand by experienced advocates, even if it be not thrown on paper. It is better to write it out carefully. Lord Bacon's saying, that writing makes an exact man, is peculiarly applicable here; for if it is but mentally constructed, some parts will be vaguely conceived and feebly grasped. And the writing abridges labor, just as it is easier to work out a hard arithmetical sum on your slate than in your head. These notes keep you from the hesitation and rambling to which one is often liable if he is indisposed, or confused by some sudden occurrence. And when you have the case to go over again, upon a motion for a new trial, or in the court of errors, or it may be in another trial, if you have preserved them with care, as you ought, they will save you much toil of recollection or new investigation.

§ 503. A forensic argument is an extemporaneous extension of the plan, though it may often omit parts of the latter or greatly change its arrangement. The proper beginning of the speaker opening the discussion is to parade the different questions, that is, those which the collision of the testimony and the opposed positions of the parties have made the special business of the jury; and if you come after an associate or adversary who has essayed this introduction, you generally have nothing to do with it except to supply omissions or correct errors. But we shall have something further to say after a while, of the separate parts of several counsel.

§ 504. Next you may have to consider whether to take up your own case or that of the other side. This is generally to be decided according as you see the circumstances demand from you more exertion to establish the one or to overturn the other. If the main contention has received evidence appearing to have produced a great effect against you, or if it has been illustrated by a telling speech of the adversary, your audience may feel it to be a virtual surrender if you do not immediately cope with the adverse case upon the decisive ground. If you can stem the attack, if you can show that this imposing array of evidence or argument is more appearance than reality, — that the one is not rightly understood, or is incredible, or is beaten back by facts which have been overlooked, and that the other fails to take account of some material points and misinterprets others, — you are not to squander your freshest energy on trifles and delay to engage the insolent advance until the jury are listless, half asleep, or irremovably set against you.

In the last instance you properly begin by combating the theory of the adversary, and this is usually the *rôle* of the purely defensive. But often there are good reasons for presenting your own view first. This is nearly always so when you represent the movant and you are first in the discussion. And when the case seems to hang in doubtful balance, or the adversary has not been very impressive, you will usually find the jury ripe for the explanation of your own theory.

§ 505. You will note that the jury like other audiences show an aroused interest whenever a speaker commences. And all the manuals wisely advise the orator to make the best possible use of these fleeting moments of impressibility.

You ought to sound your key-note at once, — to deliver in a prologue the essentials of your argument. Ordinarily what the jury expect from you tallies with that which we have pointed out to be your proper beginning. They are nearly always plunged *in medias res*, and some question of the case is uppermost in their thoughts. Chime in with them by giving a satisfactory answer, and you take the tide at the flood which leads on to fortune. For if you go forward in true progression in an argument which really clears up difficulty, they are led by you in spite of themselves. They are fond of saying that they only listen to the evidence and do not mind the lawyers. This is all banter or self-deception. If they are impartial, nine times out of ten the argument on the right side which fairly sifts all the important facts gets their verdict.

But we are running ahead. As we return to our proper place, we close this subdivision by repeating, for you to consider it attentively, that your beginning is not dictated by your notes, but by the necessities and proprieties of the moment.

§ 506. After your beginning — whether it be aggressive or defensive — you will go on through the propositions which require discussion, keeping in the way which leads to the verdict you demand. We say the propositions which require discussion; for it is a foolish waste of your time and labor to handle the irrelevant, the immaterial, the conceded, and the uncontested. You may find that you have no use for the parts of your skeleton which are the results of your most profound study and laborious collation. The live themes, — that is, the hints from the course of things in the evidence, the intimations and inquiries of the court, the positions and challenges of the

adversary, and such re-enforcement or attack as is suggested by your own note of the needs of your case, — these are enough for you to speak to. In other words, you should discuss nothing which does not practically help you to the verdict. The irrelevant and immaterial should only employ you when you divine that they have worked on the jury an impression to your hurt. Your general track is easy to find. It is determined by the relative importance of the topics of the particular case ; by what has been said already, and what not ; by the differing grounds upon which you and the adversary seek the victory. If there are independent positions, as where separate items in the declaration or different pleas have each received separate proof and there is counter evidence throughout, the issues being several and disconnected, you had better take them in the order of their importance. If you convince the jury on the larger ones, you may have little trouble with the smaller, or you may afford to abandon them. And even in a collection of connected propositions it is better to discuss the more important as early as it can be appropriately and intelligibly done.

From the beginning on to the proper conclusion you will be guided by an instinctive fulfilment of the requirements of your case. There is no severely logical order to be followed. The great *desideratum* is to speak properly to every point which ought to be noticed. Of course you will finish each one at a time, as far as you can, and not jumble things together.

§ 507. Having set forth the principles which guide you in your commencement and general arrangement, it is now the place to consider the proper methods of treating the facts. Whatever may be the particular topic in hand, your

first duty is to possess the jury fully of all the pertinent evidence. Some of it may have escaped their attention or been forgotten. Documents introduced may not have been read. As you come to each group of facts, you should be careful to bring forward every detail which you have cause to suspect is not fully attended to. As to matters of special importance you will often be justified in repeating the very words of the witnesses or documents. But ordinarily it is better to display what you would re-impress on the attention in hints or allusions briefly but fully suggesting the whole. By rational practice you can greatly improve yourself in their use, and after a while make them more effective for recalling the evidence than full quotation. What is short and striking enters our minds of itself and lodges in the memory, but the long and prosy is only forced in by persistent hammering. In most cases the collation of the evidence, — the topic to be taken up in the next section, — if it is exhaustive, sufficiently serves as a reminder.

But we add here that you ought to study extreme accuracy and fairness in your repetition of the evidence. Should your adversary make a material misstatement, you may have it set right in the reply of yourself or an associate, or you may interrupt the speaker and correct it by a brief remark to the court. The latter is nearly always preferable, being fairer to the adversary, who hardly ever intentionally misstates, and better for your side, as it removes the false impression at the earliest possible moment. Of course, both the speaker and the counsel interrupting should show a well-bred considerateness towards each other, and not the bad temper which often comes of a dispute on such occasions.

§ 508. You establish a proposition of fact by the evidence. It is first in logical order to show the proof, and you may have to gather it from many dispersed fragments. It is particularly desirable that you do not overlook anything which properly belongs here. An omission may harm by leaving your proposition too weakly supported, or by giving your adversary opportunity to show that it is untenable.

Your task is not hard where there is no serious conflict and your proof is strong. But in the most of cases you will have much to do with counter evidence. Here you have to compare and weigh, — that is, if you have decided that the point can be mooted profitably. It is implied in what we have said that you allow your adversary's evidence its full effect. Though you cannot go as far as he does, do not shrink from stating all its force. Nothing hurts an advocate more with himself, the court, and the jury, than an inclination to ignore, suppress, or misrepresent what is against him. The great use which the client has for his special talents is to convince the jury that the objections urged to the cause are not well taken, and he cannot do this satisfactorily without truly presenting and accurately criticising the adverse facts.

§ 509. You have to elevate your side and depress that of the adversary. As we showed when dealing with cross-examination, the attacks made on evidence are, that when it is rightly read it comes short of really proving the point, that is, it is defective ; it is intrinsically improbable ; and it is outweighed. You are to fend off such attacks from your own evidence and direct some or all of them effectually against that of the other side. A nonsuit of the plaintiff who has failed to prove all of his material points is a

good illustration of the first attack. But we are here giving attention to a single one of it may be several material points, and to a principle which serves either plaintiff or defendant against the other. I have observed that many advocates are prone to be overstrained or too logical in essaying to show that the opposite testimony does not prove what is claimed for it. Against such a one you may make no answer at all, or you may reply ironically or with an illustrative jest. It would be wrong to meet his feeble attempt seriously. But if you can, with advantage, throw grave doubts upon the meaning of some of the testimony on the other side, you should never let the opportunity slip; and of course it behooves you to be attentive in defending your own side from animadversion.

§ 510. To show that certain testimony is improbable of itself is a delicate matter in all but the grosser instances, as, for example, where the man swore that the horse was fifteen feet high and stuck to it. The peculiar talent involved is familiarity with common modes of thought, beliefs, and prejudices, and also with the usual incidents of the particular affair.

I note that there is too much heedless challenge of testimony upon this ground.

§ 511. The most generally successful criticism of testimony is to show that it is outweighed. The jury always like to think that they are finding according to the evidence, therefore they often accept testimony which they ought to disregard. And it is by no forcing of their natural bent that they allow the preponderance. While a shrewd advocate is arguing from not the most palpable reasons that certain evidence fails of its mark or is incredible in itself, I often see a mingled play of attention and

reluctance on their faces. And during a temperate and fair discussion, which shows that the testimony impugned is entitled to less credit than the opposite, I generally observe a responsive expression of deep interest and of assent. You may have but a single witness, who is met by several on the other side, and you may justly claim, from his excellent character, his carefulness, his means of knowing the facts, or from other reasons, that he is to be believed at the expense of the others.

§ 512. We think that this subdivision of the subject occupies the largest place of all in practice. There is serious disagreement of testimony in the large majority of cases, and it is nearly always the main problem to deal with. To mention but one instance of frequent occurrence, the parties, with their families, are often arrayed against each other. We drop the thread of our connection for a moment to say that it is better for you, if you can, to show that there is actually nothing but apparent clashing with your side, or that both sides can be reconciled in a way to save your case. Jurors, and judges too, trying facts, are loath to discredit witnesses. But if a conflict lies right in your way, you must needs try to show that the evidence of the other side on the point is to be disregarded, while yours is to be accepted. Where the former is palpably suspicious or grossly improbable, you will have but little trouble. But the common difficulty is where the colliding witnesses are all honest and intelligent, or where there are circumstances strongly opposing you. Here you must have the acumen to find the turning-point and the talent to show with patience that what seems to be the superiority of the adversary upon it is deceptive and is really unequal to your side. One witness of yours, from

his greater experience upon the subject, his better means of knowing, his more complete agreement with the probabilities and the indisputable evidence, or a stubborn and speaking fact in your favor, may decidedly overbalance the more numerous proofs offered.

§ 513. We need not further repeat the various grounds of attack or corroboration of testimony, which are somewhat extensively handled in our chapters devoted to the examination of witnesses. But we must say a word as to the potent influence which particular facts often exert. We will give some examples : —

“ A hansom cab, proceeding down Regent Street, came in contact with a brougham which was crossing at right angles. The probabilities were all immensely in favor of the brougham. It was not likely that the coachman would drive a valuable horse across a crowded street with such utter recklessness as to dash into a vehicle. The lady in the brougham said the cabman was inebriated ; the coachman said he was drunk ; and the police who took him to the station charged him with being drunk and incapable. The divisional surgeon reported him as ‘ the worse for liquor ; not unable to walk, but *unable to manage a cab.*’ This was an extremely strong case on the part of the brougham, and it was a serious one, as the valuable horse had to be killed on the spot.

“ All the evidence was as conflicting and contradictory as to the accident as could be, and to make it the worse for the cabman, the gentlemen he was driving were not called to give evidence on his behalf. He had to rely upon passing cabmen and the driver of a hearse, who deposed as to *pace*. There was, however, in the midst of all this confusion, one point of evidence which could not be contradicted.

The verdict did not depend upon the 'inebriety' or the 'drunkenness' of the cabman, or the pace of the cab, or the evidence of the witnesses, but upon a *small scratch* which had been made on the off-side of the cab by the point of the shaft of the brougham. On this piece of evidence alone there was a verdict for the defendant."¹

§ 514. The same author tells of a striking case in which the effect of the evidence was allowed in the teeth of all the witnesses.

"The action was brought by the owner of a valuable horse against a farrier for negligence by improperly shoeing; in consequence whereof the horse fell lame and had to be killed. The plaintiff endeavored to prove that the hind shoes of horses were, to use a familiar expression, 'rights and lefts.' The defendant swore that this was a totally erroneous supposition. His witnesses testified to the same effect. Perjury was not to be attributed to any of them. . . . The plaintiff was not prepared with evidence to the contrary, as the point arose during the trial from an examination of the shoe by the counsel, who placed it in the hands of the defendant, and asked whether it was not made for the near foot. He said it would do for either the near or off foot. He was then asked whether he would put it on either the one or the other, as it might chance. He answered, 'Yes.' The nails were now placed through the holes, which, being properly bevelled, gave to their points on the one limb of the shoe an outward direction, and on the other side a different inclination. The defendant was asked whether, looking at that fact, he was prepared to say the shoe was not made for the near foot. He said it was not. He was then asked how it was that

¹ Harris, *Hints on Advocacy*, 6th ed., 40, 41.

the nails in the two sides pointed at different angles. Answer: 'It was the fashion.' The Judge: 'The fashion with all farriers?' Answer: 'Yes.'

"In summing up, the learned judge (taking the testimony of the witnesses and judging it not by its truth but from its effect) said: 'If you find a general mode of doing a particular thing, you may depend upon it there is some good reason for so doing it, especially where it obtains universally in some mechanical business. If all farriers make horseshoes with bevelled holes slanting in one direction on one side and in another direction on the other, you may be sure that it is not done from mere caprice. What is the effect of the testimony? It is to show that if the shoe on which the nails slant in a particular direction be placed on the off foot, they will come out through the hoof and enable the farrier to clinch them; but if the shoe be fixed on the near foot they will have a tendency to penetrate the frog of the foot and so cause pain and lameness to the animal. The question is, was that the case here? Was a shoe intended for the off foot fastened to the near one?' The jury came to the conclusion that that had been the case from *the effect of the evidence*; the testimony, uncontradicted, being directly the contrary."¹

§ 515. Our third example is also a striking one. A colored man was charged with the murder of a white

¹ Hints on Advocacy, 6th ed., 180-182. — I must make a remark on this case enforcing the teachings of Book I. Reread Mr. Harris's sentence, "The plaintiff was not prepared with evidence to the contrary," etc. How his attorney and junior counsel alighted the manifest duty of calling experts to prove the important fact as to the proper shoe for each hind foot, is not explained. It seems to be a case of decidedly negligent preparation; and had it been tried by an average judge the plaintiff would in all probability have lost.

woman. He set up an alibi. The deceased was accounted for until about ten o'clock A. M. of the day on which her dead body had been found in a secret place late in the afternoon. The prisoner proved that on that day he had borrowed a horse from the manager of the plantation on which he was then living as a tenant, and was planting cotton in a field some four miles distant from the place where the body was found. He had only his wife to assist him, and she could not under the statute be a witness. The ground planted was about six acres. He ran a single furrow in the cotton-beds of the former year, and, to use the plantation vernacular, his wife strewed the seed behind him. When the witnesses, who passed along the road some one hundred yards off, saw him about the middle of the forenoon, he was far ahead of his wife. When he had opened the last furrow, he turned back, as he said in his statement, placed a board on the foot of his plough, and covered the cotton; and he was seen so engaged just before nightfall, having nearly overtaken his wife who was putting the seed in the last furrow. But no witness had seen him from the middle of the forenoon until the time last mentioned, and it was during this interval that the murder had been committed. The manager was a most credible man, and he was of great experience. He was positive that the prisoner had had the horse for that day only. He was arrested a few days afterwards, in the third week in April, and he had been in jail until his trial in the middle of the following June. The intervening weather had been cold and unpropitious until about ten days before. The manager, who was one of the main witnesses for the prosecution and who leaned decidedly in its favor, was made by cross-examination to prove that

the cotton had just come up in all of the rows, and that there were no appearances of anything else having been done to the ground than what has been told above; that the planting of so large a quantity of land was an unusually good day's work for the defendant and his wife. It thus appeared that the prisoner, who had been given to know that he could have the horse for one day only, had exerted himself to make the most of his opportunity, and could not spare the time necessary for killing one four miles away.

§ 516. We have a purpose in giving what may appear to be a redundancy of illustrations of something not commonly occurring. It is to impress upon you that at nearly every turning point of a case there is a stubborn fact, conceded or not seriously shaken by contest,—it may be the superior credibility of a particular witness, or a palpable probability, or the concurrence of proofs, and so on,—which will prove decisive if shown in all its force. Even such facts as those exemplified in the last three cases are often but superficially understood at first. They—and still more those which we have hinted at in this section—require to be discussed patiently, and turned over and over in different aspects and relations, before the jury discern their full significance and widest reach. To bring them out of obscurity and advance them in their due conspicuousness, is frequently the greatest exploit of the advocate. And closely akin is the achievement of correctly reading a mass of varied details. The average man will see nothing in it but irreconcilable contradiction and inexplicable confusion. But the master of facts will assort its parts under their proper heads, rightly interpreting each and all, and he will take his auditors with him as he discards the false

and embraces the true. He finds the real meaning of every detail, both of itself and in its relation to the others. This is the power which Goethe showed at its highest in his solution of Hamlet, — a character which had down to that time baffled everybody except Shakespeare himself. The proper analysis, the true grouping, the right theory, — if produced after an impartial review of the facts, — are self-evident. And the true interpretation of such important facts as we have considered in the next preceding sections likewise meets with instant acceptance. You must find a constant guide in that practical discretion which keeps you from fruitlessly straining with the jury. If you are in earnest to profit by your experience, you will after a while acquire a discernment of what you can and cannot have the jury to do.

§ 517. The same sure and safe judgment must prevent you from being too adventurous in your legal positions. As a general rule the verdict is in accordance with the instructions of the court. So it behooves you to get such instructions as will give the jury the least possible liberty against you. It is very important for you to discover the leaning of the court as early as you can. You must attend to every word that he lets fall. You may sound him by an offer of, or by an objection to, particular evidence, or by the submission of a point. But if you still remain ignorant of his opinion you ought to try further. Often you will succeed in making the discovery desired by respectfully addressing a pointed inquiry to him. The noncommunication in America between counsel and judges during argument is far behind the English practice. Judge Redfield says of the latter: "In consequence of the constant questioning of counsel by the judges, and the intimation of

difficulties, it more commonly happens that legal questions are argued mainly upon that side where the court feels difficulty, and thus much time is saved in the trial.”¹ If your judge is reticent, draw him out. For you take aim in the dark and shoot at random if you do not know whether he understands you, or whether, if understanding, he agrees or dissents.

§ 518. When you detect an adverse leaning it is not necessarily incumbent upon you to essay changing it. You are first to consider if you cannot fit your case to the rule which he will give in charge. If you can do this, it is nearly always a better course than to engage in combat with the judge. And perhaps you can sacrifice the point and yet receive such instructions as will authorize a good verdict for you. Of course you need not waive your exception.

§ 519. It is often politic to prefer specific requests for instructions. They ought in general to be axiomatic, — that is, their soundness as legal propositions and their applicability to the case in hand should be obvious. Now and then, however, you must have a novel or abstruse question decided for you before you can win or hold a verdict. The successful line of argument here is generally one which shows your point really to belong to the most unquestionable provisions of the law, — that it is not *casus omissus*, and that its novelty is only seeming. The authorities which you read should fairly cover the proposition mooted, and if they are not well considered you should strengthen them with such views as your observation convinces you to be influential with the average judge.

If the court does not give an intimation in favor of your

¹ Law Almanac, (1870,) 74.

cardinal legal propositions you had better read even the most familiar authorities which sustain them, such as the statute, relevant code sections, and well-known decisions of your court of errors. The best judges now and then, in the haste and confusion of *nisi prius*, rule counter even to such authorities.

§ 520. The argument which is nothing but a law argument is mostly made before the court of errors, but yet it occurs in trial practice often enough to require notice here. It is to present the process and result of study of the question involved. In another place we have essayed to indoctrinate the student in the methods of Legal Investigation.¹ To have sure and ready possession of these is the only equipment for convincing the court through the whole range of cases, from those demanding the most elaborate and learned inspection of records and authorities — as is illustrated by the renown and success of Binney in his “great argument” in *Vidal v. Girard's Executors*² — to those wholly novel and without precedent, deeply affecting the interests of the public, which must have original solution in searching inquiry into the nature of the particular subject and the reason of the law, — a most striking instance of which is the effort of Webster in *Gibbons v. Ogden*, which we incline to rate as the best of all his speeches.³

§ 521. But to return from the last digression. It greatly advances you with the jury to have your cardinal legal propositions assented to by the judge. To draw from him a favorable intimation during your speech will

¹ American Law Studies, §§ 765-809.

² 2 How. 146-164.

³ 9 Wheat. 3-33. Cf. Webster's narrative of his satisfaction with this argument, Harvey's Reminiscences, 140-142.

help you ; but if you fail in this, and if you have satisfied him, he will approve your positions in his instructions, which will be of much advantage. Of course, you submit your law to the court, and while you may expand and illustrate it to the jury to aid them in the application, you are not to argue it to him.

I once observed a lawyer who had the invincible, but very unpopular, side of a case. His policy was to ignore the jury, there being actually nothing for them to do. The judge busying himself with drafting his instructions and unconscious of everything else, the lawyer made an elaborate development of his law to the jury. His adversary accepted the challenge and addressed his reply to them. The former got decisive instructions in his favor, but the jury, who had been made by both counsel to feel that they were judges, disregarded them, and decided the law according to their preferences. The verdict was set aside, it is true, but there would not have been an improper one if the counsel making the first argument had urged his propositions to the court alone.

§ 522. We have in the foregoing sections of this chapter set forth the contents of an average argument. This typical scheme, containing the best reasons which you can collect from the facts, and the applicable law, is the staple of all the trial practitioner's happy speaking. It is in average cases of far more effect than eloquence. Scarlett and Jeremiah Mason could not be called eloquent, and yet they were the most formidable forensic antagonists of their time. And the study of Erskine and Choate shows that the principal aim of these two great orators was to solve rightly the questions of fact and law in their cases. Abstract from their speeches that which answers to what

we have pointed out as the business of the forensic speaker and the remnant is almost unmeaning. Such a comparison of Scarlett and Mason with Erskine and Choate gives true opinion of the value of these essentials of argument, and shows that while they can win without eloquence the latter cannot win without them.

Having now completed the outline of our subject, we must devote some space to details not yet noticed.

§ 523. As we have already said, the matter of your speech is twofold; that is, you have on one side to advance your own affirmative points, and on the other to reply to those of the opponent. The first counsel we give here is that you be temperate and exhibit fairness. It is nearly always the true policy to claim for yourself a measure of proof which somewhat comes short of your full strength, while conceding a greater strength to the other side than really exists, and at the same time to justify the verdict you ask. Restrict the scope of your proofs and enlarge that of the counter ones if you can still show your positions to be such as command assent.¹ The lawyer who exaggerates his side, and unduly depreciates the other, is sure to call upon himself dangerous comment in the reply, and from the court and jury. It was a great art cultivated by Scarlett, with increasing achievement to the last, to understate the facts on which he relied. His aim was to have the jury find for themselves a support for his side which

¹ Compare Horace's

"Vim temperatam di quoque provehunt
In majus."

("The gods increase force which is rightly regulated by the judgment.")

Note also Morison's saying that Macaulay never understood "the force of moderation, the impressiveness of calm understatement, the penetrating power of irony."

he had apparently overlooked. For men will pet their own ideas while they are indifferent to those of their fellows. The special skill of Scarlett was to lead the jury to the point where they would necessarily make the desired discovery without disclosing his purpose.¹ Mr. Harris is in accord with the matchless advocate when he says:—

“There is a mode of creating an impression on the mind of a jury without in the least appearing to desire it, and which is of all the most effective. All men are more or less vain, and every man gives himself credit for a deal of discernment. He loves to find out things for himself,—to guess the answer to a riddle better than to be told it,—to think he can see as far into an opaque substance as most people. . . . If you want a point thoroughly to impress the jury, don't actually make it, if you can effect your object by a less direct means; let the jury make it for themselves, only be sure that it is made.”²

§ 524. If you are one of the great number who have not the faculty of this dexterous suggestiveness, you can however surely avoid extravagant claims for your client and improper disrespect of the case against you. You can array your own proofs with correctness and you can impartially weigh the adverse evidence, neither adding to the former nor taking from the latter. The effect you allow the testimony, explanation of it to be given here and conjectural piecing to be made there, the line of discussion you follow, every step by which you go towards your goal, and your final summary if it is needed,—all ought to be unstrained, moderate, probable, and even self-evident as far as possible. The successful advocate of our day has a

¹ See American Law Studies, § 1090.

² Hints on Advocacy, 6th ed. 17.

sharpened perception of that which will be accepted or rejected by the average man. The morals, maxims of expedience, and the logic current in the community, — to borrow the distinction of Lord Bacon, — he has in judgment and use, though many times he could not express nor set them down. However deeply he may be versed in the multitudinous library of the law, he is not a man of books while he talks to jurors. His methods are those current at the fireside, in the chat of promiscuous meetings, which rule in business transactions and sway the opinions of ordinary men, the great majority of whom seldom read more than a newspaper. This is not to say that any man picked up in the street can properly argue a case; but we mean that the ideal forensic argument will carry the typical juror along, never getting beyond his understanding or provoking disagreement with statement or principle. So you are to remember that not alone your propositions, but the ways by which you advocate them, are to be such as will naturally find favor with the multitude.

§ 525. We have emphasized moderation and fairness. It is true that there are successful lawyers who are always very positive and very intolerant of difference. Such have great accuracy in sifting testimony, and discerning what is the most probable conclusion therefrom. But the best friends of these strong men lament their arrogance and bluster, and recall many of their miscarriages where a more pleasant manner might have saved the day.

§ 526. If you cannot find at least a plausible view counter to that of the adversary, leave the latter alone. Shallow replies, which one should dignify beyond desert to call fallacy, are often spouted forth with ardor and earnestness, only to be recognized by the jury as shameless

attempts to gull. Yield, or do not contest, or turn attention from a point that is palpably against you. Sometimes, when you can find no fit answer, no opportunity of compensation in attack elsewhere, none of diversion, your sole resource is to keep your eyes shut to the danger. The advocate now and then resorts to what may be called an ignoring stratagem. The following is related of Choate.

§ 527. "In giving his testimony, a witness for his antagonist let fall, with no particular emphasis, a statement of a most important fact, from which he saw that inferences greatly damaging to his client's cause might be drawn if skilfully used. He suffered the witness to go through his statement, and then, as if he saw in it something of great value to himself, requested him to repeat it carefully that he might take it down correctly. He as carefully avoided cross-examining the witness, and in his argument made not the least allusion to his testimony. When the opposing counsel, in his close, came to that part of his case in his argument, he was so impressed with the idea that Mr. Choate had discovered that there was something in that testimony which made in his favor, although he could not see how, that he contented himself with merely remarking that though Mr. Choate had seemed to think that the testimony bore in favor of his client, it seemed to him it went to sustain the opposite side; and then he went on with the other parts of his case."¹

As the foregoing is told, we can hardly understand how Choate's adversary was caught in the trap he saw set for himself. An obvious ruse is worse than useless. And behavior which is really trick can be but seldom tolerated,

¹ Nelson, *Memories of Rufus Choate*, 324, 325.

and be but seldom successful when attempted by even the best of men in the best of cases. Remember the words of Bacon : —

“ Certainly, the ablest men that ever were have had all an openness and frankness of dealing and a name of certainty and veracity ; but then they were like horses well managed, for they could tell passing well when to stop or turn ; and at such times, when they thought the case indeed required dissimulation, if then they used it, it came to pass that the former opinion spread abroad, of their good faith and clearness of dealing, made them almost invisible.”

§ 528. We turn now to another branch of the subject. As a general rule, fine speaking is to be avoided. Jurors are influenced by exposition of the evidence and the demands of justice in the case. If there is a particular manner which is potent beyond all others with them, it is lively but not heated discussion. It is much above ordinary conversation, and yet much nearer to it than to the violent action of the ancient orators. From seeming in his speeches to be only inquiring with the jury after the proper verdict, Scarlett was called the thirteenth juror. If you make such a dissection of the evidence as is really helpful to a finding, you will receive attention ; the more surely, because of your animation and avoidance of excessive repetition or dilution. You should not delay with reasoning too refined or deep, for the juror usually looks for a short and easy road. We may sum up the section by saying that you are to reason and not to declaim, to be both temperate and animated, and to proceed as rapidly as you can to have the jury understand you and be duly indoctrinated in your views.

§ 529. It is a common fault of even experienced lawyers to give the rein to censure of the opposite side, — the views of counsel, the character of the other party, and the testimony of his witnesses. This is unwise for several reasons. The advocate appears, and he generally is, too passionate to consider the facts carefully. It opens the way for disastrous refutation, either from your adversary or attentive jurors when they talk together. And lastly we may mention that it usually excites an active sympathy in favor of the persons censured. Now and then there is perjury in witnesses and misdeeds of parties which ought not to go unwhipped, but it should always be your care to apply the scourge only where and in such measure as it is seen to be deserved. But it is to be early enforced upon the trial counsel that ordinarily, if such cases are but presented in their real characteristics, they will of themselves the more surely call for and receive their merited execration. And this course is of a piece with the custom of Scarlett, who suggested to the jury without their knowing it what they deemed a view of their own.

§ 530. The trivial and unimportant stubbornly set up against you as cardinal and decisive, absurdity urged with gravity, the adversary's exaggeration of his own evidence and his injustice to yours, his over-zealous harangues, are better treated with raillery and banter than with seriousness. And it has long been my observation, that even fraud, oppression, gross perjury, and all such heinous acts as strongly excite the speaker to invective and the hearer to indignation, are within the scope of Horace's

“ *Ridiculum acri*

Fortius et melius magnas plerumque secat res”;

which we may translate, “ *Ridicule often disposes of*

matters of weight and moment better and more decidedly than acrimony." Ordinarily the advocate opposed in these cases defames and vilifies, and sometimes with great achievement; but when, as happens now and then, he merely apologizes for the other side with well-sustained irony, we note that he makes the most effective of all attacks.¹

§ 531. A witticism often adds irresistible force to a strong point. A man was put on trial charged with *disturbing a congregation of white persons assembled for the purpose of divine worship*. Note the words of the statute which we have italicized. The prosecutor, the first witness for the State, wore a coon-skin cap, and his dress and air were those of a frontiersman. He bore the striking name of Edward Worshipful. He testified that while he was attending church at the time and place laid in the indictment, he was greatly disturbed by certain conduct of the defendant. As he was shaken by the cross-examination the State's counsel called some of the members of the church. They said that they saw the defendant at church, but they could not be coaxed into proving any act of disturbance committed by him. There was no other evidence. The defendant's counsel being entitled to the last word in the argument, he was asked by his adversary to give notice of his positions and authorities under the rule of court. He answered that he had but one, to wit, that Edward Worshipful never was a congregation of white persons assembled for the purpose of divine worship. Great laughter applauded the hit; and the counsel for the State surrendered.

¹ Compare this and the last section with what we say in *American Law Studies*, § 1187.

§ 532. We will give another illustration. A lawyer was arguing that his client had not been identified as the person who had stolen some cotton from a house at night and carried it off by a particular route, along which scattered fragments of cotton had been found the next morning. Three witnesses had sworn to having recognized the prisoner, each at a different place on the route. Although the cross-examination had drawn out that there was no moon, the night was very dark, and rain falling, and no one of them was nearer than ten paces to the prisoner, and it had also led every one to make palpably improbable statements of having noted the face, expression, and gait of the prisoner, still the advocate discerned by the subtle sense which often reveals to us the dissent of our silent listeners that the jury were decidedly against him. He displayed the irreconcilable discrepancies of the witnesses; he dwelt upon some facts which pointed strongly to a conspiracy among them against the prisoner; and he almost began to scold when he urged the impossibility of seeing with human eyes at the time in question as well as they pretended that they had seen. But each juror showed increasing disagreement.¹ He suddenly changed his mode of approach by telling the following:—

¹ Some instructive as well as entertaining stories are told of Choate's encounters with jurors inclined against him.

"On one occasion, observing by the manner of a jurymen that he was hostile to his client, he caught the man's eye, and pointing directly towards him, said, 'I will make this point plain, — I will make it plain even to you, sir.' The jurymen quailed, and finally agreed to the verdict desired by Mr. Choate." Neilson, *Memories of Rufus Choate*, 380, 381. Note his silent conference with the red-headed juror. *Ibid.*, 38, 39.

But the most remarkable case of all is the ardent and prolonged argument which at last converted the stubborn foreman. Whipple, *Some Recollections of Rufus Choate*, 15-17; quoted by Neilson, 124-126.

"A famous Confederate general was marching his brigade down Lookout Mountain during a dark and rainy night in the autumn of 1863. The soldiers were everywhere falling upon the sharp stones in the wet and slippery path. They began to vent their wrath upon the commander of the army. Why could he not have waited until light, when they could see to pick their way safely along the steep descent. This was worse than Egyptian darkness. The brigadier in good temper reasoned with those nearest his horse. 'Boys, boys,' he said, 'it is not so dark, I can see very well.' A voice about six feet to his side replied, 'That's a damned lie.' 'You disrespectful knave,' yelled the general, 'if I could only see you I would have you court-martialled and shot before day.' The voice answered, 'You said you could see.'"

This worked instant conviction on judge, jury, and all the crowd. The reply of the State's counsel was up-hill progress, and after a short speech he virtually gave up.

§ 533. A law point was enforced in the former of the two instances just given, and a proposition of fact in the second. Each was a conclusive argument of itself, and the wit but opened the minds of the hearers to take the argument in all its force. There is often a ludicrous view that vividly brings out the hidden truth, and it is a trump when you can play it.

There are cases which can be saved only by humor. Mr. Harris's horse-stealing case,¹ — though intended as an example of a cross-examination to have it appear that the horse, when seen by the witness for the prosecution, was running away with the prisoner, and consequently had not been stolen by him, — as it was the foundation of a humor-

¹ Hints on Advocacy, 6th ed., 254-257.

ous speech, may serve as an illustration. It is a great and rare consummation of the advocate to sustain a cause by pleasantry and humor when all other means fail him, reminding of the line,

“Solventur risu tabulae, tu missus abibis.”¹

§ 534. Wit and humor, like declamation and fine speaking, are only effective so far as they are relevant and are vehicles of controlling views. Scarlett is to be heeded when he says of the forensic speaker:—

“His duty is to make such use of his facts, and of the topics which his own imagination may suggest, as will lead to the conviction of the jury in favor of his client. His sole object ought to be to persuade those twelve men to come to a specific conclusion. He may declaim and be as amusing as he can upon collateral topics, but they will not in the least help him to his object, even though the judge should not interrupt him, nor will they command long the attention of the jury, who are ever anxious to see their way clear before them and to lay aside mere topics of amusement. . . . He must disdain all jest, ornament, or sarcasm that does not fall directly in his way, and seem to be so unavoidable that it must strike everybody who thinks of the facts.”

The last-quoted sentence is especially to be emphasized. Where you disregard its advice and ramble, either you have your adversary to turn the tables against you, or the jury who can separate your declamation or wit from the facts to follow their usually strong propensity to compromise by applauding both sides,—you with admiration or laughter, and the adversary with the verdict.

¹ “The accusation will be abandoned with a laugh, and you will go free.” Hor. Sat. II. 1. 86.

§ 535. Some lawyers are irritated by blunders of their clients or associates, or disconcerted by sudden occurrences or by the taunts of the antagonist. The advocate who preserves unruffled temper, coolness, and alertness of all his faculties, hardly ever succumbs to a surprise. He parries the most sudden blow, or deals a shrewder one in return. In defeat even he covers all that can be saved, and by his composure and skill appears as victor over conquering fortune. We give a few instances of the escape of ready-witted advocates from exigent straits.

§ 536. A man had just come into his yard at night after an absence of several weeks. He was surprised to hear a noisy conversation of several people in his house. He knocked and shouted for admittance. He walked away from the steps in order to look through a window. His wife at last opened the door, and, not recognizing him, went towards him to inquire what he wanted. A man came out, seized her roughly and ordered her to return to him in the house. In no good humor before this, the husband attacked the other man and gave him several wounds with his pocket knife. On his trial for assault with intent to murder, his counsel opened the facts just narrated as his defence. The cross-examination of the prosecutor and other witnesses for the State had made a good preparation for him, and he had reason to hope that the unsworn statement which the statute allowed his client to make would be accepted. But the defendant when he went on the stand forgot himself, and thought only of shielding his wife. He told of his arrival at home, his knocking, and of her appearance. Then he told that the prosecutor rushed out of the house towards him, holding a knife behind him; and he concluded, "Gentlemen, I cut him in

self-defence ; but I have nothing against him." This was counter to the evidence, to the knowledge by the public of the affair, silly, and unmanly ; and the State's counsel compared it with the opening mentioned, to the great damage of the defendant's cause. The prisoner's counsel, having the last word, began as follows : " Gentlemen, I am more embarrassed than I ever was in a trial. In accordance with my instructions and with what I almost know to be the truth, I placed the defence upon the ground that the prosecutor was behaving improperly towards the wife of the prisoner. Certain facts had been proved which at least inferentially supported that defence, and I expected to have you believe the prisoner when he stated to you the real truth of the stabbing. But the goose, when he got upon the stand, was only anxious to save the credit of his wife, and he said that he did not stab the prosecutor on her account, but because the latter was attacking him. In which " — here he looked at the prisoner — " you told a lie, did n't you ? " Before he could be prevented, the prisoner answered, " Yes," with a sudden frankness which could not be disbelieved. After this the advocate discussed the evidence, maintaining his position set forth in the opening, and he got an acquittal.

§ 537. A Solicitor-General — the designation in Georgia of the official State's counsel of a judicial circuit — had consecutively tried eight or ten persons charged with misdemeanors, and all had been acquitted. Under the statute, each jury had been taken from the same panel of twenty-four, — the State having four challenges and the defence eight. His strong and satisfactory evidence had been met either by none at all, or by that which was flimsy and of little weight. By varying his challenges he had made trial

of every member of the panel. In each case he had shown an increasing carefulness and attention in the conduct of the evidence, and a greater earnestness in the argument. A verdict had just been received with riotous fun on the part of the counsel for the several defendants and by many of the crowd in attendance. Nothing daunted, our Solicitor-General selected another jury, and proceeded with the trial of the only remaining case. When the time came for his argument he said, with cold dignity of manner: "Gentlemen, I have found all of you utterly unfit to be jurors, and your unfitness has not been that of ignorance. From the first case to this I have noted your sly smiles, nods, and winks to one another, and to the prisoners and their counsel. Your verdicts can only perish with the records of the court. I care not further to resist your manifest desire to disregard your oaths. So make the acquittal of this man, whom the evidence shows to be guilty, the capstone of the monument which you have this week erected to keep your perjury in memory."

The jury found this defendant guilty.

§ 538. A distinguished counsel appeared for the State in an important prosecution in a county where he was little known. During the trial, in common with nearly everybody else, he had become convinced — to use a colloquialism — that a jury had been put upon him. He opened his argument thus:—

"I have been told by many who should know — and I must frankly tell you that I believe them — that you are here with no other purpose than to acquit the defendant. My sole object now is to convince these good people" — here he glanced at the large audience — "that the State is justified in placing the defendant on trial, that he is

guilty beyond a reasonable doubt, and that his acquittal can be got only from a packed jury."

He then arrayed the facts against him with more than the high degree of clearness and power which was his wont. His countenance was turned to the jury, but he never recognized their presence afterwards. Everybody felt that he was keeping his word, and was only addressing the community. When he ended, there was an expression on all the faces among the crowd which the dullest could interpret as unrestricted approval of the lofty demeanor of the advocate and fierce menace of the jury. The latter deliberated after their retirement for several hours, and came into court with a verdict of guilty. It was universally thought that the jury shrank from the virtuous indignation which they foresaw that an acquittal would excite.

§ 539. The common prejudices call for a word of special treatment. As Mr. Harris says, "Intelligence and prejudice are the two master influences on the jury."¹ There are popular notions and beliefs — many of them more or less irrational — which, as you know, color important parts of your case to ordinary jurors. Their friendships to particular persons, the good or bad standing of well-known people, whether parties or connected by interest or bias or as witnesses with one side, the general attitude of the community towards sectional and political questions, sympathy with the claims of women, the unpopularity of rich corporations, especially railroads, are a few examples of feeling and emotion which often blind the judgment of jurors, and even judges. If they are favorable to your side, generally you may leave them to command themselves, and when they must be aroused it had

¹ Hints on Advocacy, 6th ed., 7.

better be by sly and indirect than open appeal. You should hardly ever count surely upon them, for you can never know when something may occur to excite the nobler part of human nature into dominance. Your avowed reliance upon them may either cause a damaging recoil, or prepare the jury for a potent invocation of justice by your adversary or an impressive warning from the court.

The most difficult task is in dealing with hostile prejudices. Sometimes they need to be combated directly, but often it is right to ignore them; it is usually bad when they are very active to deprecate them with earnestness, as that is calculated to call them out in greater strength. Discrimination is a special talent of the lawyer, and by selecting for presentation certain of your unobjectionable facts, and abandoning those that are practically unmain-
tainable, you may shift your case out of the aim and shot of these doughty enemies, and even secure allies of other powerful prejudices.

§ 540. In conclusion upon our present topic, we say that you should avoid a tendency to build on the lower passions and feelings. Such a tendency when indulged goes from bad to worse. It will make you hard-hearted and one-sided, of only occasional efficiency, and utterly unfit you for performing the high feats which now and then distinguish your humbler brethren. The speaker who never leaves the region of charity, and has thereby learned the secret of opening the hearts of his hearers to unpopular right and justice, is always the refuge of clients and the worship of the bar.

§ 541. We have given no place yet in the chapter to the special consideration of the emotions, although we have really had much to do with them. We can now

easily finish the subject. The most important thing remaining to be said is, that nearly every case excites its appropriate feeling, which may or may not be rightly treated by the advocate. A, a merchant in a country town, was an agent to sell a fertilizer manufactured by a company in a distant State. He failed, but just before his failure sold a large quantity of the fertilizer to B, a relative. The company brought an action against B, upon the theory that the sale was fraudulent. On the trial the plaintiff perforce called both A and B, and the hardest squeezing in what was really a cross-examination of his own witnesses brought out that A was owing B for borrowed money an amount about equal to the value of the fertilizer, and that the acquittance of this debt was all that B paid. It was pretended that A's agency—which had been advertised and posted for over a year—was not known to B, and that the latter had no suspicion of the failure, which occurred in two days afterwards. B was made to admit that he was a planter, living in the county, that the quantity of the fertilizer was two or three times more than was needed for his plantation, and that he had never bought any fertilizer except for his own use. On the issue submitted, whether or not B was aware of the agency when he bought, he seemed to have the advantage. The jury was one of planters, who were at the time somewhat prejudiced against the plaintiff because there had been extensive sale in the community of spurious and adulterated articles under the name of fertilizers. The defendant had put in no evidence, and thus he had the last argument. The counsel for the plaintiff had learned that A was also a cotton factor, and that some of the planters of the county whose cotton was on sale with him had suf-

ferred by his failure ; and further, that the failure was regarded as fraudulent. From this he took his cue. He said : " Gentlemen, suppose that a planter had delivered his crop to a merchant in this town as his factor. Having no immediate need for money and expecting a favorable change in the market, he gives no instructions for immediate sale. Suddenly he hears that his factor has failed. Coming to town to look after his interest he learns that a cousin of the merchant, to whom the latter was largely indebted, got possession of his cotton the day before the failure, and that the factor owed many others, not one of whom was paid. The cousin had never bought any cotton before except some odds and ends now and then to make out a full bale. Supposing that planter to be in the box, I ask him, Would you credit the cousin protesting that he was not expecting the failure, and that he believed the cotton, when he received it, was the property of the factor, — of a man whose only business with cotton was to sell it on commission ? "

This was all. The counsel in reply struggled with the net thus cast upon him, but became the more enmeshed the longer he struggled, until at last he was bound hard and fast. The jury retired only for form's sake. There was no attempt made to set aside the plaintiff's verdict.

§ 542. The most common mistake made by the would-be orator is that he can of himself raise a tide or breeze of feeling to carry him safely into port. He can no more do this than he can manufacture proofs or legal provisions by hocus-pocus. The extreme of his invention is to find his suasive topics in the evidence. The shining effusions of the advocate, from the play of banter and raillery to fervid invective or melting pathos, are cogent only so far as

they are but the language of the real facts, the rhetoric and æsthetics of the case in perfect union with its sound logic.

The latter is first to be found. And when found, addressing only the understanding, as it does, it is often dry and soporific. When the missing half, that is, the revelation of the subject to our hearts, is joined, the two in their union become the perfection of speech, satisfying the hearer both in conviction and conscience.

§ 543. A side is often argued by several counsel. It is customary to give the last speech to the senior or leader. An associate following another should supply his omissions and avoid repeating what he has said. The mission of each speaker is to find the exact place open for him and to address himself to the questions which need consideration. The discussion has wrought much effect upon you. What you deemed your surest points you have to abandon, while there is compensation in finding that ground which you feared was too weak to be held is now proof against all attack. And the actual issues have become far more sharply outlined than they were in your anticipation before the trial. The best possible verdict which you had shaped to yourself at the close of the evidence, you must now modify by asking for more or less of something else, in whole or detail. If you have an able adversary and your mind is susceptible, as it ought to be, of just impression, his searching inquiry will almost necessarily alter your opinion of much on both sides of the case. You are not to reply to your associate. When you differ with him you should advance your view as an independent one, worth considering along with the other. Where one comes after several opposing speakers he can sometimes accomplish

great things by discarding all doubtful evidence and basing his entire claims upon that which is undisputed or not seriously questioned. A striking example is afforded by the argument of Copley in the Queen's case.¹

We close the section by saying that the duty of each speaker is to keep on the tide of the discussion. He does not perform the duty if he merely produces what has already been said, and it is a like waste of energy if he belabor other points than those which the evidence and previous argument have brought into contemplation, or which have been overlooked while they need attention. Nor do we say that he must deal entirely in original views. He may often satisfy every need of his case by giving nothing more than a new presentation of positions already urged.

§ 544. The policy of long or short speaking is often mooted. It must be remembered that some men give themselves out fully in concise language, while there are some who can be intelligible only by diffuseness. And there are many cases which can be rightly presented in little time, while there are others — not so numerous by far as the class last mentioned — which demand multifarious and extended treatment. As a general rule you should be as short as is compatible with complete communication of the decisive views and their lodgment in the minds of your hearers. There is not only something which ought to be said, but it is also to be clinched. An old authority who inclines to long speaking confesses that brevity is to be observed when the cause permits, but he pronounces it collusion with the adversary for you to leave unsaid what ought to be said, and the same to touch has-

¹ Trial of Queen Caroline, American ed., Vol. II. pp. 456 *et seq.*

tily and cursorily on that which should be inculcated, driven in, and repeated.¹ A versatile speaker who has the talent of condensation will impart the governing considerations upon each head in a few sentences, sending them home by striking illustration, and another with the gift of a different style will accomplish his end by a wider course, impressing by amplification, and often even by persistent repetition of strong points, as Fox used to do in the House of Commons. You must instinctively discern when you are losing attention either by excessive compression or dwelling too long on a particular, when you can generally recover it by changing your style or going to something else.

The last that we have to say in this section is that the true mean should always be labored after: the advocate who is prone to believe his hearers can leap to conclusions with him had better study a little more of patience and copiousness, and he whose propensity is to fulness and exhaustiveness should strive after the excision of useless presentation and discussion.

§ 545. The greatest triumph of a speech is that it be unanswerable by the adversary, the judge summing up, or the most intelligent jurors in their deliberations. It is usually won, not by positiveness and over-confidence, but by a thorough-going comparison of the rival proofs and positions, and an inoffensive exhibition of your pre-

¹ "Quam [sc. brevitatem] ego custodiendam esse confiteor, si causa permittat: alioqui praevaricatio est transire dicenda, praevaricatio etiam cursum et breviter attingere quae sunt inculcanda, infigenda, repetenda." Plin. Ep. I. 20. — In this letter Tacitus is consulted whether a long or short forensic speech is better. Though the discussion is more from the standpoint of the rhetorician than that of the modern lawyer, it is worth considering for some of its just views.

ponderance. If you have forgotten nothing which should be put in the balances; if you have been prudently moderate in demanding credit for your propositions and denying it to those of the opponent, overstating the resources of the other side and yet fairly overcounting them by your own understated; if you have given no vantage by excursion, illustrations that do not fit exactly, or wit, humor, and declamation which are foreign, and not merely feathers to make your arrows of argument fly straight; if you have not been too hurried or tedious, and if you have preserved throughout the right tone, aggressive or deprecatory, lofty or conciliatory, etc.; — when you close your success is generally assured with an honest jury, even if you are to be replied to by a consummate advocate, always ardent and impressive and equally polished and ornate in his premeditated and extempore passages.¹ This success is not your victory, but that of the truth and right of the case.

§ 546. We ought to have advised you in an earlier section that sometimes it is better to forego argument. If you have done your whole duty and brought out all the case of the client, and yet the evidence, or the law, or both, are so clearly against him that all hope is gone, you should surrender. Argument is useless. You should not desire to succeed here if you could. And now and then your case is so strong and that of the adversary so bad that he will offer to dispense with argument. I note that argument is too often insisted upon even by that side which has nothing to gain by it.

¹ "Audivi causas agentem acriter et ardentem nec minus politè et ornate, sive meditata sive subita proferret." Plin. Ep. I. 16. (The author's eulogy of Saturninus.)

§ 547. Never overrate the power and influence of forensic speaking. It is but rarely the province of the advocate to do more than show that he is already entitled to his demand. But there is often conduct of cases upon the assumption that an ingenious speech may blind the jury and hoodwink the judge. Judges are sometimes surprised into wrong decisions, and juries duped into mistaken findings; but these occurrences are not so frequent as those may believe who have never carefully averaged results of trials and arguments.

§ 548. In the palmy days of Grecian and Roman eloquence, the sway of orators was almost infinitely stronger than it is now. To understand their fame we must recollect that their habitual feats were with the feelings and emotions rather than with the judgment. The tricks, deception, and the excitation of the lower passions by speaking, as Shakespeare exemplifies in Antony's making turncoats of the Roman mob on the spot and then triumphing to himself over his achievement, are no longer potent. Our Pinkneys and Websters, having the fullest and most precise and accurate knowledge of their cases, convinced the understanding far more than they aroused the feelings. And the reader of the far-famed speeches of Erskine sees that his power was in his mastery of his case. We have already called attention to the careful record of the testimony made by Choate, and his industrious revision of his notes every night during the trial.

§ 549. The secret of good speaking and even of eloquence is in due attention to those duties of preparation, and of the conduct of the trial, which we have treated at length. It is only now and then that you win by a speech alone. The narrowing province of eloquence at the bar is

in the cases where public feeling and sympathy are opposed to justice. For success in these difficult cases we can give no sure recipe. Courage, persistence, and the most careful preparation, demonstrating the right over and over, should precede the speech. In the common run of cases one lawyer of fair speaking ability is about as effective as another. But there are some, such as those just described, which should be argued by the best speaker accessible. Any sound and cool-headed lawyer will know how to select him.

§ 550. The motto of the advocate should be to fail in no good case. It was high praise bestowed on the great lawyer when it was said of him that he could not win a bad nor lose a good one. No advocate should ever throw off his allegiance to the law. He is a *lawyer*, and even when defeated, if the law is administered, he should rejoice. Lord Campbell's picture of the King's Bench under the auspices of Chief Justice Abbott, is that of almost ideal perfection. He says : —

“ Before such men [Littledale, Bayley, Holroyd, besides the Chief Justice] there was no pretence for being lengthy or importunate. Every point made by counsel was understood in a moment, the application of every authority was discovered at a glance ; the counsel saw when he might sit down, his case being safe, and when he might sit down, all chance of success for his client being at an end. I have practised at the bar when no case was secure, no case was desperate, and when, good points being overruled, for the sake of justice it was necessary that bad points should be taken ; but during that golden age law and reason prevailed ; the result was confidently anticipated by the knowing before the argument began, and the judgment was

approved by all who heard it pronounced, including the vanquished party. Before such a tribunal the advocate becomes dearer to himself by preserving his own esteem, and feels himself to be a minister of justice, instead of a declaimer, a trickster, or a bully. I do not believe that so much important business was ever done so rapidly and so well before any other court that ever sat in any age or country."

§ 551. Of course zeal for our clients will often pull the most cool-headed away from the apparent right and justice of the case. But the advocate should so bear himself that he can feel at the close of his career that in all of his arguments he has been — to use Lord Campbell's words again — "a minister of justice, instead of a declaimer, a trickster, or a bully." It is not required of him to blacken good character, pervert truth, and crown wrong. His influence and sway, even in speaking, will grow with increasing years, if his hearers know that he says only what he has good reason for believing. There is nothing which can vanquish, in the average of cases at the bar, accurate insight coupled with perfect honesty. He who from first to last of every trial, even the longest, never gets the minutest detail awry, who neither suppresses nor misstates, and who goes over all the proof and gives its substance so correctly that no man of sufficient mind to understand it can dispute his representation, is a dangerous advocate at *nisi prius*. He is soon found out where he practises, and court, jury, and bar begin to lean on his superior powers. The most skilful adversary may have the last word to the jury, but at the first misstatement of material testimony the spell and charm of oratory are broken under the inevitable and irresistible correction.

CHAPTER XIV.

NEW TRIAL AND APPEAL.

§ 552. AFTER the argument, you will diligently note the instructions of the court. If the verdict is adverse, you will see if there is reason to arrest the judgment. But our pleading is fast becoming so untechnical and inartificial that the motion in arrest has almost disappeared save in criminal practice. You will next consider whether you will move for a new trial. Here you should exercise the same deliberation which we advised you to use over a case offered. The courts lean strongly against new trials ; and you must show some material and well-grounded complaint before you can hope to get another hearing. Your client will be controlled by you, and it will generally be right for you to discourage him unless you see that the verdict is really wrong. Sometimes the evidence is so mixed, and the truth so doubtful in other respects, or the forensic collision and sifting have changed the views of both sides, showing that from misconception the case has not been really presented on its merits, that it is proper to get a new trial on any ground possible, though it be purely technical and dilatory. And oftentimes you have been unexpectedly pushed into trial, or there is a strong and partializing prejudice against your side, or the judge enlists against you, and life, liberty, or fortune is in the scale,

and you discern that the precious stake is in great peril. You have need of all your coolness, ingenuity, and quickness. Your fight will not be so much for the verdict, almost hopeless, but for a ground of self-recovery to wipe out your adversary's triumph. You must catch the court napping, or trap the other side, or so strengthen your cause on some strong point of fact or law, that a verdict against you cannot stand.

§ 553. You have kept notes of the trial, and have, if it was long, revised them at every recess. In these you have a record of your objections taken to testimony, of exceptions to rulings or action of the court, and of everything else which may now profit you. You did not forego your privilege of praying specific instructions from the court, or of requiring his whole charge to be in writing, and now you have time to meditate what he improperly denied you and what he too graciously granted your over eager adversary. Nor will you fail to pry into the constitution and behavior of the jury, and avail yourself of any good cause you find. We must take it for granted that the student knows the various grounds upon which new trials can be had, and we cannot stop to enumerate them. It is our province, however, to enforce upon him the great advantage and wisdom of an intelligent purpose. We noted in our chapter on Plan of Conduct the duty of the lawyer preparing his case to have an eye to securing a ground of new trial, just as a prudent general endeavors before the battle to provide himself with a safe way of retreat.

§ 554. But however painstaking may have been your anticipation, most of your best grounds of new trial will occur unexpectedly. You must have the wit to recognize them instantly in order that you may not undo them igno-

rantly. Thus I knew a counsel for a defendant, in a bill in equity trying by a jury, whose answer on a most material point had been met by but a single witness, to refrain of purpose from comment on the fact in his argument, his reason being that, had he suggested the defect, a reopening of the evidence would probably have been granted to the complainant, when the latter would have easily supplied the measure of proof necessary to overcome the answer under the rule. This counsel lost the verdict, got a new trial, and finally succeeded from having exactly learned where to strengthen his proof.

§ 555. There is an art of having certain grounds, which are not required to complain as distinctly as others, of such wide implication that you can often bring out of them much that did not strike you at first. A good instance is the usual statement that the verdict is against the evidence, under which, in your argument, you may often make many different specifications. Such grounds are helped by a copious report of the evidence. I have known thoughtless counsel to discover great use for a clause of a document omitted because it seemed at the trial utterly trivial and irrelevant.

§ 556. At your earliest leisure complete the draft of the evidence and of your grounds, and at once procure the required authentication. Nowhere is procrastination more hurtful. Only wait a few weeks after a trial, and the judge has lost his notes, or if he has been too lazy to take any he has forgotten everything ; or the phonographic reporter, if there was one, is out of the way and has the documents put in evidence, your adversary's memory is counter to yours in many particulars of importance, and you may have to confess with chagrin that a good case has been lost by your sloth.

§ 557. While reading history I have often fancied how eagerly some defeated general would have caught at an opportunity to renew the lost battle, with all his wounded healed and his killed raised from the dead. Varro would have doubtless rejoiced to try Cannæ over, certain that he could not be so terribly beaten again. In the respect of a new trial, litigation has an attractive diversification to which warfare presents nothing corresponding. Often liberty and right would win, if they could only have a new battle ; but they cannot have it. In forensic contest, on the other hand, triumphant wrong is again and again subverted by the same force which it had lately vanquished.

§ 558. Nothing is more admirable than the spirit of a discerning lawyer, who will not endure in a good case an oppressive ruling or a partial verdict. He seems to know by divination when he can have the one reversed and the other set aside. After such a mischance he no more doubts his final success than the famous refugee of old would take a less price for his farm because it was then occupied by the army of the victorious enemy.

§ 559. The books and a short experience in practice will tell you when to dispense with a motion for a new trial and rely only upon a bill of exceptions. But it is to be suggested that you always, when you can, give a judge opportunity of correcting his errors. In arguing the motion, do your best by patient and convincing method to show that he has erred, and let him have time, if possible, to reflect. By pursuing this course, you will often secure a new trial where otherwise you would fail. Courts of error always attach great importance to the action of the judge below. When he is dissatisfied with the finding and sets it aside, it is odds that they will not disturb his judgment.

§ 560. To sum up : (1.) Have an eye to a new trial in your preparation. The peculiarities of the judge, your adversary, and many other things which you can reasonably anticipate, will be suggestive. (2.) During the trial be always on the alert to secure a good ground, remembering that Providence helps those who help themselves. (3.) As soon as you can after the adverse verdict, — if you have decided not to succumb, — review carefully the whole track of the trial, state your grounds and the evidence, and have them certified.

Bear in mind that, where your verdict has been set aside, to except may be either very foolish or the only thing to do. The former is exemplified when you are standing more upon popularity and sentiment than evidence. Here you should refrain from going to the court of errors before you have had at least two concurring verdicts, and sometimes three ; otherwise a trenchant criticism of your evidence by that court may put it out of the power of another jury to find for you. But, on the other hand, if your evidence is strong, and the grant of the new trial is placed upon a ground the concession of which will be a death-blow to your case, you must needs except. Although there will hardly be a reversal, still you may procure such a favorable ruling on the particular ground that you can hold your next verdict.

§ 561. We urge that the lawyer always follow his important causes to the court of errors. He owes it to himself to learn appellate practice, and he owes it to his client to give the latter the benefit of his knowledge of the record, which is necessarily superior to that of any possible associate. He can often read between the lines or give an interpretation of difficulty and save the case, when if he were absent the adversary would prevail.

§ 562. We now leave the subject of New Trial with a word or two. One of the uses of the remedy is to insure justice, not only to parties, but to lawyers. I am strongly of opinion that no lawyer should submit to a verdict or ruling grossly bad, even if he must resist without fee or reward. We must teach our equals of the bar, our superiors of the bench, and the public at large, a wholesome respect for our ability and pluck.

Our next suggestion is that you rein yourself in during the trial where you see you have the upper hand, and that you likewise check and hold back the judge who seems to enlist for you, so that you may afford your watchful opponent no opportunity to snatch your verdict from you. Choate went a little too far when he advised getting the verdict in any way, and fighting it out with the judges afterwards.

Our last word is, that, if you have to move for a new trial, you take all good points. Of course the small, the little, and the trivial you will none of. But throw away none of your good chances.

§ 563. Generally the young lawyer first makes his mark by showing spirit and capacity to reverse a careless or slighting judge.

If you have lost the verdict, wishing you the talent to find strong grounds for a new trial, and success before the court of errors if your motion has been denied, and hoping that when you try again you will rout your adversary because of a new grouping and presentment of your case, we take our leave of this branch of the subject, for there is so little additional to say about Appeal that we will say nothing.

CHAPTER XV.

VICTORY AND DEFEAT.

§ 564. IF after the verdict or its affirmance in the court of errors anything remains to be done, it should be energetically done. Negligence and supineness may make triumph empty.

I once witnessed the trial of a seduction case which was conducted so well and argued with such effect for the plaintiff that the jury found large exemplary damages. The successful counsel went to his home in an adjoining county, and a few weeks afterwards he heard that the defendant had left the State. He hurried back to the county seat where the case had been tried, and, entering the office of the defendant's lawyer, as soon as their salutations were over, he asked where the defendant was; to which the other replied that he had gone to New Orleans. Why had he gone, was asked, when his host gravely informed him that it was to attend the General Assembly of the Presbyterian Church then in session in that city, and he reminded his visitor that the defendant's mother and sisters were zealous Presbyterians. The bird had flown. The plaintiff's lawyer made an ineffectual effort to collect his judgment out of some property formerly owned by the defendant. Had he ordered the latter taken in execution at once after he had entered up his judgment, he would not have lost his fee, as he doubtless did.

§ 565. When you are on the losing side it will often require great courage to advise submission to the inevitable. We have more than once before this reminded you that you should dissuade from all useless strife. Hannibal was as great in influencing his vanquished countrymen to make peace with the Romans as he had been at Cannæ. When you see that all hope is over, get the best terms you can, and control your client. It is seldom that there is any real disagreement between lawyer and client on this point. The trouble is generally in the eagerness of the lawyer to win, and in his moral cowardice to give judicious but unpalatable advice. We should know that we can achieve impossibilities no more than others. The vain counsel who believes that he can win any case is fated to meet with disaster after disaster, and can never stand well with the practical men who have the most business and money for a lawyer.

§ 566. We sum up this short chapter by saying, (1.) push your victories, and (2.) capitulate in your unmain-
tainable cases on the best terms to be had. Be neither a party nor an inflamed partisan; but strive to set to all of your clients an example of obedience to law.

FINAL CHAPTER.

CHARACTER OF THE SUCCESSFUL LAWYER.

§ 567. OUR two Books have been devoted to enucleating and exemplifying the principles of right conduct of litigation. In various places here and there we have incidentally let fall many hints as to different professional qualifications and traits. It is now time, even at the cost of some iteration, to make a full portrayal of him who is skilfully and efficiently to use our counsels in practice. We begin with contrasts between different legal vocations.

§ 568. The consummate practitioner differs from the author of able and learned law treatises, as an advanced farmer from a profound agricultural chemist. The principles of law or chemistry are of the first importance to the legal and scientific author, and he bends all things to their proper presentation. But the books serve the lawyer only to gain his case, just as the farmer asks nothing of Liebig and Ville but how remunerative crops can be made. The law-author deals with the general and abstract, while the lawyer is mainly busied with the special and concrete. Each general rule in the text-book or the statute has in view, at least potentially, many cases; while the lawyer is always engaged upon one case, and his standpoint, different from that of the author and legislator, is strikingly shown by the requirement that acts coupled in the statute

by the disjunctive must be laid conjunctively in pleading. For in the statute the disjunctive distinguishes independent cases, but in the indictment it disconnects parts of the same case and deprives the allegation of each one of certainty. The judge, hearing both sides but confined to the case, is nearer by far to the lawyer than to the author. Judge and lawyer decide legal questions in the same way and by the exercise of the same faculties. The lawyer must be quicker of apprehension and more inventive. Not only must he decide on a case presented, but in its conduct he is also to do something else which never troubles the judge: he has to select the questions to present. He selects and argues, and then the judge argues—or considers—and decides. Both are inferior to the great law-author in deep and scientific knowledge of the law, but they have a ready command of the legal principles ordinarily applied where the one presides and the other practices. These principles they use as tools, and their expertness with them is often astonishing. No author has ever given a complete enumeration and exposition of these legal principles of common application; but we know that their number is not infinite. While no man can be said to possess the whole, yet there are members of the bar leading in all important causes, by the spontaneous homage of every associate, and judges born to decide aright, who do nearly understand thoroughly the most of them. Note such a lawyer trying a case. Every exception or point that he takes, even if not well taken, he supports by some principle which you cannot controvert, though you may show that it is misapplied. It would frequently puzzle him were you gravely to demand of him authority for a rule which he assumes. Such rules of law

—that is, those controlling the average of cases—are allowed as soon as cited, and the superiority of the practitioner is quickness in seeing which particular rule decides the case. He does not acquire this faculty so much from books as a great many believe. He gets nearly all of this readiness in the law by practising law. The books contribute to his professional education, by introducing him to the rules of law with which he will play after a while as his counters; his easy command of these rules is not learned from books, as is the bulk of the law-author's knowledge. This dominion and sway of common principles, this practical wisdom in the law, is a necessary element in the constitution of the successful lawyer.

§ 569. But although this element is so important that the lawyer derives his name from it, there is another intellectual element in his composition of still more importance, namely, a grasp of facts and details. Details, when numerous, must be systematized to be understood; that is, they must be decomposed into their elements, and then the latter be appropriately arranged. The particulars found to be like one another are to be thrown together into groups, and the groups will be collocated in rational order. Take, as an illustration, an author at work digesting a series of law reports. He reads a case, and, picking out the points, he puts each one under its proper head in the accepted vocabulary of the law. This is the same kind of work which the lawyer must do with a particular group of facts. Whether they are the jarring and clashing testimony of many witnesses, or a pile of conflicting documents, they must be first rightly read and next rightly generalized, in order that the lawyer may discover what case they make. This is the talent of the historian who reads the times long

past aright, piercing the haze and fog of contemporary writers. It is the talent, too, of the scientist, the skill and glory of Newton and Herschel. To analyze aright and then classify aright is the talent that marks them all in each vocation. The lawyer develops it more and more, and he cultivates it more exclusively. You will find him as he is gradually shooting up into leadership studying law less in the books as a daily set exercise, and giving his best hours to familiarizing himself with the particulars of his cases. He will often make an elaborate preparation without looking into any law more recondite than a few of the local statutes, or some of the local decisions which he has found annotated upon the former. The older he grows, the less of books he cites, even to the court of last resort. When you contemplate him closely, you will see that his great business is not with law as a science, but with the facts and details of his cases, which when he has properly grasped and presented he has many times no need at all for books.

§ 570. Before we move on, we will briefly recapitulate. There are two mental elements of the lawyer : one a head for the law, and the other a head for facts. He must have a facility in the application of commonly used rules. He must not only be prompt to think of the right rule, but he must be able both quickly to apply it and to demonstrate the soundness of the application. But the other constituent is the leading one. It is the power which teaches what case is made by the facts. The lawyer who has this good gift often condescends to get his citations from an inferior. There are many jackals in the profession who hunt down and capture the needed authority for the lions of facts.

§ 571. The intellectual root which branches out into both of the talents which we have been describing is insight. Sometimes we call it acumen. This vision of the truth, either of facts or of the controlling legal principle, is the community of the two faculties of the lawyer. And this intuitive perception has long been deemed an indispensable of all genius. Lord Bacon recognized its dominance when he said, "*Prudens interrogatio, quasi dimidium scientiæ*," which he translated, "A faculty of wise interrogating is half a knowledge." And he cited a great authority when he proceeded: "For as Plato saith, 'Who-soever seeketh knoweth that which he seeketh for in a general notion, else how shall he know it when he hath found it?'" When Napoleon said that the art of war was all in being the stronger on a certain point, he implied for the general ability to see what was the decisive point, and also how he could be the stronger on that point. The lawyer must likewise discern the key-positions of the case, and he must further see how he can have the ascendancy on these. This intellectual vision precedes any action, for it dictates action.

§ 572. We give a case told by Mr. Bishop, as an example of the importance of accurate insight.

"Some years ago, a deputy collector in one of our custom-houses was bribed, and he procured permits for the landing of large quantities of foreign goods, on which duties were not in fact paid. The permits bore the genuine signature of the proper officer, they were in all respects correct in form, and all the formalities attending any case of regularly passing goods through the custom-house were gone through with. After the fraud was discovered, some of the goods were seized by the collector; but on looking

into the statutes he found no one which seemed to meet the case. There was an enactment against landing goods without a permit, and there were various provisions for particular irregularities by the importer in passing his goods through the custom-house. The collector, therefore, after getting all the legal advice he could, and finding, as it was supposed, no statute to meet the case, gave back the goods he had seized, and concluded nothing could be done. Some of the goods were taken to other collection districts, and efforts were made to hold them; the various legal advisers of the government, and other lawyers called in, had consultations, and it was determined definitely that nothing could be done.

“In this state of things, some dealers in the same kind of goods, finding they were undersold by the holders of goods on which no duties had been paid, went to counsel who had not been in the other consultations. These persons were thereupon advised that, if the collector would make a fresh seizure, the goods could be held. This was done. When the case came before the court, it was seen that the new counsel had presented it as an ordinary one of smuggling, just as though there had been no permit issued; in other words, the very existence of the permit was ignored. And when the defendant brought forward the permit for his protection, it was simply shown to have been procured by the fraud of bribing the deputy collector, rendering it in law a nullity. . . . As soon as this legal principle was suggested, the whole scene was made light. The result was, that without further difficulty a decision was obtained from the court pronouncing the goods to be smuggled. The goods in the other districts were also seized and confiscated.”¹

¹ First Book, §§ 124, 125.

§ 573. The counsel last consulted, to use the common colloquialism of the bar, *saw the point* which the others had not seen. And the case, besides illustrating the command of legal rules usually administered in the courts which the successful practitioner must have, also exemplifies the superiority of that insight or acumen which is the main ingredient in the mind of every lawyer born to lead. Nothing could be more familiar and hackneyed than the principle which the triumphant counsel invoked. When he announced it, even the laymen in court doubtless saw that he was right. It was an egg of Columbus. And brightly to elucidate that which seems dark and intricate with a homely legal principle, is what the good lawyer does every day. His superiority is in seeing that there is really no difficulty, that the veil hiding the truth is only imaginary; and he exhibits the same acuteness in matters of evidence, detecting therein a meaning and potency which others overlook until he chooses to show them, and then for a while they can see nothing else.

§ 574. I once noted in a trial a singular obscuration of the real question to both court and counsel, where each counsel was deservedly eminent and the judge was one of the quickest and acutest men I ever knew.¹ The issue arose under a local statute out of a distribution in kind of an intestate's estate. One heir, conceiving that he had not received all of his share, had sued the other in order to be equalized. The defendant relied on the general issue. There was much testimony on both sides, and the preponderance of the evidence clearly established that the defend-

¹ The case was tried in the Superior Court of Oglethorpe County, Georgia, in 1857 or 1858, Thos. R. R. Cobb and A. H. Stephens being the opposing counsel, and Thomas W. Thomas presiding as judge.

ant's portion exceeded that of the plaintiff in value, say \$1,000. The counsel in their openings and arguments, and the judge in his instructions, all assumed that the jury should find for the plaintiff whatever amount the value of the defendant's share exceeded that of the other. Just as the jury retired an old layman who had long made a respectable figure in that court as a grand juror, and who was permitted a seat inside the bar, approached the judge and laughingly said in an undertone, "You have only put the boot on the other leg." "Bring that jury back," roared the latter to the bailiff, who obeyed at once. "Gentlemen," resumed the court to the jury, "I have made a great mistake. If you believe that the defendant's share exceeds the plaintiff's in value, you must find for the plaintiff one half of such excess." The jury retired again, and soon returned with a verdict in accordance with the last instructions. This was a similar defect of vision in the counsel and the judge to that of the lawyers who laid their heads together over the fraudulent permit, and it was remarkable that what seemed so plain at last had not been seen from the first. This was another egg which stood up on its broken end.

§ 575. Examples would be multiplied to no good purpose. Every lawyer's experience affords multitudes. We are now only calling attention to the transcendent importance in the practice of the law, as well as in all other human undertakings, of seeing things right. This talent or genius, call it what you may, if coupled with a preponderant force of will, as is insisted upon for the general in the next following quotation, spontaneously exalts its possessor to command in any business of life that he may make his own. Themistocles meant to claim this crown

for himself when he erected near his house the private chapel "in honor of Artemis Aristobule, or Artemis of admirable counsel."

§ 576. As we have suggested many resemblances of litigation to warfare, doubtless our readers have already anticipated that he who conducts the former is in many respects like him who conducts the latter. We add from Marmont's *Spirit of Military Institutions* his analysis of the good general, laying great stress, as it does, upon resoluteness of purpose and consequent promptness to act, — characteristics which are likewise all-important to the lawyer.

"The art of war, considered as to what constitutes the profession, is entirely combination and calculation. . . .

"Two things are requisite in a general: intelligence and firmness. The former, because without that there are no combinations; at the outset the army is defenceless. The latter, because without a strong and tenacious will the execution of the plans conceived cannot be assured. But here relative qualities govern absolute qualities; firmness must rule intelligence. In this relation is found the element of success. If we desired to estimate by figures each of these faculties I should much prefer a general possessing intelligence as 5 and firmness as 10, to one having intelligence as 15 and firmness as 8. When firmness governs intelligence and mind has a certain *range*, we move along towards a defined aim and have chances of attaining it. When the reverse is the case, opinions, plans, and direction are changed unceasingly, because a vast intelligence at every instant considers the questions under a new aspect. If force of will does not secure us from these changes, we float among the different schemes, adopting none definitely, (the worst feature of all,) and instead of

approaching the goal, a shuffling march often leads us away from it, and we are lost in wanderings.

“And yet the conclusion would be wrong that there is no need of much mind to accomplish great ends. A mediocre mind is not to be found in any of the great generals of antiquity or of modern times,—in any of the great historic names which march through the centuries above their fellows. Alexander, Hannibal, Scipio, Cæsar, possessed the highest faculties of intellect. It was the same with the great Condé, Luxembourg, the great Eugene, Frederic, and Napoleon. But all these great men to a superior mind added still more strength of character.”¹

§ 577. The experience of every observant person is full of instances of men ingenious in counsel, but deficient in action. It seems that Shakespeare intended his Hamlet to represent that type of character where great minds are joined with infirm purposes. The Hamlets of the bar, who understand all your points and are full of valuable suggestions for you, never work except spasmodically. They are born for contemplation instead of action, and their position at last becomes rather that of *amici curiæ* than that of practitioners.

§ 578. The good lawyer is pre-eminently a man of action. He can no more rest if he would, than Napoleon could have done in Italy surrounded as he was by the Austrians. Day after day adversaries attack him, or force him to attack, until when he is in large practice he is inclined to say with Macbeth :

“The flighty purpose never is o’ertook,
Unless the deed go with it. From this moment
The very firstlings of my heart shall be
The firstlings of my hand.”

¹ Coppée’s Translation, p. 252 *et seq.* (Philadelphia, 1862).

§ 579. Shakespeare makes Hamlet, as he sees men of resolve marching off to war, exclaim upon his halting self:

“What is a man,
If his chief good and market of his time
Be but to sleep and feed? a beast, no more.
Sure, He that made us with such large discourse,
Looking before and after, gave us not
That capability and godlike reason
To fust in us unused. Now, whether it be
Bestial oblivion, or some craven scruple
Of thinking too precisely on the event, —
A thought which, quartered, hath but one part wisdom
And ever three parts coward, — I do not know
Why yet I live to say, ‘This thing ’s to do.’”

This passage presents the hesitation of the man of mind who delays to act with profound psychological penetration.

§ 580. Themistocles is the opposite of the lagging Hamlet, and he is perfect in both insight and strenuousness. He sees instantly and he acts instantly. To borrow from Shakespeare again, he does not think too precisely on the event, and the very firstlings of his heart are the firstlings of his hand. Grote, paraphrasing Thucydides, says: —

“He [Themistocles] conceived the complications of a present embarrassment and divined the chances of a mysterious future with equal sagacity and equal quickness. The right expedient seemed to flash upon his mind extempore, even in the most perplexing contingencies, without the least necessity for premeditation. He was not less distinguished for daring and resource in action: when engaged on any joint affairs, his superior competence marked him out as the leader for others to follow, and no business, however foreign to his experience, ever took him by surprise or came wholly amiss to him.”¹

¹ History of Greece, Chap. XXXVI.

If we forget the corruption and treachery of Themistocles, he becomes a priceless lesson. We may not expect to parallel him in the dull rounds of our little professional lives, but it will greatly help us to keep in mind the exact balance of rare acumen and consummate deed which has made him the model man of action.

§ 581. The man of action must have courage, which for the lawyer and general means coolness and self-command rather than boldness. He who in the most desperate straits, such as the desertion of a witness on the stand to the adversary, a surprising decision of the court against the central proposition, or the development of an entirely misconceived case of the opposite party, never loses his self-possession, but instantly does what is best to be done, has the necessary courage. This courage keeps the eyes always open, and things are seen right. To see right is the highest achievement of genius. To see danger right is at the same time to see the true escape. "Out of this nettle, danger, we pluck this flower, safety," said never-daunted Percy. What seems danger to the common man, the good eye discerns to be mere menace. Passion and wrath cannot serve for this collectedness. Again we appeal to Shakespeare, who makes Enobarbus say of Antony, frantically rousing himself for a last effort with the conquering Augustus :

"Now he'll outstare the lightning. To be furious,
Is to be frighted out of fear ; and in that mood
The dove will peck the estridge ; and I see still,
A diminution in our captain's brain
Restores his heart. When valor preys on reason,
It eats the sword it fights with."

And another character in the same play wisely says :

“ Never anger
Made good guard for itself.”

This is an old tale in practice. When the leader's heart is restored by a diminution of his brain, and his action is heated and angry, he is near disastrous fall.

§ 582. Our hero is practical, turning away from all irrelevant matter. He does not regard court as a place of discursive debate ; and his evasion of difficulties is instinctive. While the younger counsel are wrangling, he has forgotten their question, and is about to deliver battle from the vantage ground of palpable truth. There are many things which he knows to be stronger than himself. He husbands his power for the achievable. He knows the principles by which judges, out of a varying and many-sided nature, determine legal questions, and the influences which lead juries, often changeable and mercurial, to their findings. In all of his calculations, while he makes the necessary allowance for weakness, infirmity, and even ignorance and prejudice, he assumes that his umpires are honest. The query he proposes to himself is, By what principle shall I win ? What authority or reasoning will bring the judge to me here, and what combination and show of the evidence will convince the jury or persuade them to find for me there ? But the pettifogger is known by his reliance on trick ; his study is to devise deceits ; he plays with loaded dice ; he meditates a partial juror, a prompted witness, a perverted exhibition of the case, or some other sham, telling falsehood or denying truth. What a groveller and sneak is this to the true lawyer, who recognizes that, like warfare, litigation has too its code, and who even in extremity fights fair and always obeys the laws of honorable combat !

§ 583. It is hard to formulate the character of the successful lawyer. He is to be self-confident without self-conceit. He is to combine the extremes of boldness and caution: for he is to be prompt, even in the most doubtful and delicate matters to decide what is to do, and then he must act with celerity and certainty; and yet both his decision and action are to be deliberate. It is almost a misnomer to call him a lawyer. His knowledge of the law is the smallest part of his professional attainments. He must know mankind better than he does the code and reports, and he must understand the infinite play of the feelings which, far more than their reasons, move the people with whom he deals, — parties, witnesses, jurors, referees, even the judges. He must be able to tell, almost without premeditation, when the courts will administer the letter and when the spirit of a particular statute. He must at all times know the most darling secret of his adversary. He must recognize truth intuitively, wherever it is, and falsehood likewise, and be ever capable of making both plain men and learned courts see with his own eyes. He cannot be infallible in every instance; but when he sees right so often that his few mistakes become wonders and common talk, he is that man of men in society, that zenith of modern training and culture, of which each one of our States can show a few examples, — the pride and glory of the American bar.

§ 584. This is the miniature of the good lawyer. It is not over-colored. Romance and adventure checker his daily life. He is more than a frothy speaker to tickle and set agape the populace, and more than the lucky drawer of great prizes in his fees. He is a wise, patient, toilsome, intense worker, living in his cases, and hanging over them

as affectionately as a mother over her children. He fights as many battles in a year as a general in a lifetime, and again and again expends on some controversy of trivial moment, where his only fee is the thanks of the poor or the blessings of the widow and orphan, more invention, labor, and "skill of conduct" than often fill a long campaign that ends in an ever memorable defeat of overcounting thousands.

§ 585. We have tried — thoughtfully, conscientiously, and laboriously — to make a full exhibition of the principles according to which the good lawyer accepts, prepares, and tries his cases; and in this last chapter we have done our best to sketch his intellectual and moral features, and combine them into his honest likeness.

We hope the fact that the subject has never received complete treatment, and that the failure of the books — even those devoted to advocacy and evidence, and those which tell the lives of great lawyers — to do more than consider it in parts or fragments, will excuse our many insufficiencies. The conduct of litigation has been too long without its manual, — a manual of the details of preparation as well as those of forensic management, all being told in their due perspective and actual unity. We do not pretend fully to have supplied the great want. A first attempt to make a complete presentation of such an extensive art by gathering together and systematizing its traditions, a very large part of which are unwritten, is a much more delicate task than painting a portrait or constructing a map from memory. In addition to long search after the widely dispersed particulars, and painful recollec-

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tion from one's observation and experience, the analysis, classification, and exposition required are only to be perfected by the concurring efforts of many generations. While we have necessarily fallen far short of what we would have done, we trust that, as a humble and solitary pioneer, we have somewhat smoothed the way for the column of organized workers behind.

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